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REPORTS OF CASES

IN THE

SUPREME COURT OF APPEALS

27358

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MARTIN P. BURKS, STATE REPORTER.

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JUDGES
OF THE
Supreme Court of Appeals
DURING THE TIME OF THESE REPORTS.

JAMES KEITH, PRESIDENT.

RICHARD H. CARDWELL.

JOHN A. BUCHANAN.

GEORGE M. HARRISON.

STAFFORD G. WHITTLE.

Attorney-General:

WILLIAM A. ANDERSON.

State Reporter:

MARTIN P. BURKS.

RULES OF COURT.

XXI. Rules and Regulations for Licensing Persons to Practice Law.

1. Every person applying for a license to practice law must first have obtained from the Circuit Court for the County, or the Corporation Court of the city wherein he resides, a certificate that he is a person of honest demeanor, is over the age of twenty-one years, and has resided in this State the preceding six months. The application for such certificate shall be by writing, addressed to the court, specifying the day when the motion therefor to the court will be made, and be accompanied by the written recommendation of two members of the Bar of his judicial circuit, who are practicing attorneys in this court, that he is of good moral character and a proper person to be licensed to practice law. Such application and recommendation shall be filed with the clerk of such circuit or corporation court ten days before the day on which the court will be asked to grant the said certificate, and a copy thereof forthwith delivered by the clerk to the judge of the court, provided, however, that any person over nineteen years of age who has studied law for a period of two years in a law school of this State, or in the office of a practicing attorney of this State, and who is otherwise qualified to take the State bar examination, shall be allowed to take such examination; provided, further, that no certificate to practice shall issue to such person until he shall have attained the age of twenty-one years. In the event the applicant is over nineteen, but under twenty-one years of age, the exact date when the applicant will be twenty-one must be stated in the application so that this court will know when the license can be issued to such applicant.

2. Every applicant for examination for a license to practice law shall file with the clerk of this court, *not less than three days prior to the first day of the term* at which he proposes to be examined, such certificate of his circuit or corporation court, and also a certified copy of his application therefor, and of the recommendation of the members of the Bar, which accompanied the same, which, in the absence of evidence to the contrary, will entitle him to be examined for a license.

3. An annual examination will be held as follows: At Richmond on the first Friday of the January term, and *at Wytheville on the third Friday after the first Tuesday in June*. No examination of any applicant will be made at any other time than on the days herein named.

4. The questions and answers of every examination will be in writing, but where the Judges are in doubt as to the result of the examination of any applicant, he shall be liable also to an oral examination.

5. All applicants will be liable to be examined on the following subjects, viz: Real and Personal Property, Domestic Relations, Contracts, Agency, Partnership, Negotiable Instruments, Insurance Corporations, Wills and Personal Representatives, Torts, Equity Jurisprudence, Pleading and Practice at Law and in Equity, Evidence, Crimes and Criminal Procedure, Powers and Duties of the Corporation Commission, and the Code of Virginia.

6. Every applicant will be required to affix to his examination, and subscribe with his own name, the following pledge: "I hereby certify that I have neither received nor given aid or assistance in any manner during this examination."

Sept. 9, 1905.

[For other rules see Vol. 100, pp. V-XII.]

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CASES DECIDED
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

Wytheville.

BUTLER V. NEWS-LEADER CO.

June 15, 1905.

Absent, Cardwell, J.

1. **LIBEL AND SLANDER**—*Identification of Plaintiff—Mistaken Identity.*—The publishers of a newspaper are not liable in damages for publishing a libel of a plaintiff where the publication was made without negligence on the part of the publishers, was not made of the plaintiff, but of another person, and was not in its description or identification such as to lead those who knew or knew of the plaintiff to believe that the article was intended to refer to her. The fact that the name, occupation and career of the person actually referred to corresponds closely with that of the plaintiff will not render the publishers liable when there was no purpose to refer to the plaintiff, and the publication was not made recklessly but after due enquiry, and a portion of the publication itself excludes the conclusion that it had any reference to the plaintiff.

Error to a judgment of the Circuit Court of the city of Richmond in an action of trespass on the case in libel. Judgment for the defendant. Plaintiff assigns error.

Affirmed.

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Opinion.

The opinion states the case.

Hill Carter, for the plaintiff in error.

Munford, Hunton, Williams & Anderson, for the defendant in error.

KEITH, P., delivered the opinion of the court.

Annie Butler brought an action of trespass on the case in the Circuit Court of the city of Richmond, in which she complains of the News-Leader Company on account of a certain publication concerning her, which she alleges to be false and libelous.

It appears that the plaintiff had been, at one time, a famous rifle shot connected with the Wild West Show carried on by Colonel Cody, commonly known as Buffalo Bill; that she appeared at public exhibitions under the name of Annie Oakley, which the declaration alleges was her maiden name, by which she was commonly known and called; that some time before the publication she had left the employment of Colonel Cody, and been living with her husband, Frank Butler, in New Jersey, and had not been guilty of any of the disgraceful and improper acts, nor was she addicted to the habits, published concerning her; and that the defendant, well knowing the premises, but intending to injure her, had made the publication which is set forth in the declaration as follows:

“Annie Oakley (meaning the plaintiff) at the Bottom of Toboggan (meaning that the plaintiff had sunk to the lowest depths of moral degradation).

“Once Famous Beauty and Crack Shot of the World (meaning the plaintiff) Winds up in Police Court for Petty Theft.

“Chicago, Ill., Aug. 13.—Annie Oakley, daughter-in-law of ‘Buffalo Bill’ and the most famous rifle shot in the world, lies

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to-day in a cell at the Harrison-street station under a Bridewell sentence for stealing the trousers of a negro in order to get money with which to buy cocaine.

"This is the woman for whose spectacular marksmanship King Edward himself once led the applause in the court-yard of Buckingham palace.

"When arrested Saturday on the complaint of Charles Curtis, a negro, she was living at 140 Sherman street. She gave the name of Elizabeth Cody, but it occurred to no one to connect her with Colonel Cody's famous daughter-in-law. .

"To-day, however, when brought before Justice Caverly, she admitted her guilt.

" 'I plead guilty, your Honor, but I hope you will have pity upon me,' she begged. 'An uncontrollable appetite for drugs has brought me here. I began the use of it years ago to steady me under the strain of the life I was leading, and now it has lost me everything. Please give me a chance to pull myself together.'

"The striking beauty of the woman whom the crowds at the World's Fair admired is gone. Although she is only 28 years old she looks almost forty. Hers, in fact, is one of the extreme cases which have come up in the Harrison-street police court. To-morrow she will be taken to Bridewell to serve out a sentence of \$45 and costs.

" 'A good long stay in the Bridewell will do you good,' said the court.

"The prisoner's husband, Samuel Cody, died in England. Their son, Vivien, is now with Colonel Cody at the latter's ranch on the North Platte. The mother left 'Buffalo Bill' two years ago, and has since been drifting around the country with stray shows."

The plea was "not guilty," and the jury found the following

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verdict: "We, the jury, find on the issue joined for the defendant."

During the progress of the trial a number of exceptions were taken, but none of them pertain to matters or questions of any particular interest, and we shall advert but to one instruction and to the evidence bearing upon it.

The court told the jury that if they believed from the evidence "that the article complained of, as published by the defendant company, did not refer to the plaintiff, Mrs. Butler, but to a person who was sometimes known as Annie Oakley, and used this title, stage or fanciful name in order to attract the notice of the public, and was not in its description or identification such as to lead those who knew or knew of the plaintiff to believe that the article was intended to refer to the plaintiff, then they must find for the defendant."

That this was a correct instruction is plain, and if the facts supported it, it cannot be doubted that the verdict should have been for the defendant.

The plaintiff lives in the State of New Jersey. She is a married woman, doubtless of entire respectability. She had been distinguished in her career as a rifle shot, had won much applause and fame both in the United States and abroad, and had retired upon her laurels. Her name was not Annie Oakley, either before or after her marriage. Though the declaration avers that her maiden name was Annie Oakley, she in her testimony states that prior to her marriage her name was Nozee.

There was connected with an exhibition known as the "Wild West Show" a Mrs. S. F. Cody, sometimes known as Miss Lillian Cody.

She began her career at the age of fifteen, married one Sam Cody, and achieved much reputation by her shooting with the rifle and pistol. She appeared also in London, in Paris, in

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Germany, and in Italy. The shows to which she belonged, it is to be inferred, were not exactly upon the same plane or level with the higher class represented by Buffalo Bill's "Wild West Show," and it is to be inferred also that Mrs. Cody did not have the same rank in her art as was enjoyed by the plaintiff in error. She had, however, achieved much notoriety, if not fame, and had also affected a stage name, by which doubtless she expected in some degree to confuse herself in the public estimation with the more distinguished artist. Mrs. Cody it seems was known as Any O'Klay, *idem sonans* with Annie Oakley when somewhat carelessly pronounced.

The experience in the Chicago police court actually befell Any O'Klay, and that which appears in the declaration, and which the innuendo asserts was intended for the plaintiff in error, was a stern fact, and hard experience in the life of Mrs. Cody. Her name, her occupation, the company with which she performed and the innocent, or it may be the interested assumption on her part of the stage name resembling in sound that borne by the plaintiff in error, all served to confuse the situation. The article which appeared in the *News-Leader*, it is shown, had theretofore been frequently published in a number of reputable newspapers, among others in the *Evening Star*, of Washington, a newspaper shown to be conservative, careful, and accurate.

The evidence wholly negatives actual malice. It appears, indeed, that neither the editor-in-chief and president of the News-Leader Company, nor others upon the staff of that company connected with the publication in question, had any knowledge of or acquaintance with Mrs. Butler, or Mrs. Cody. They found a report of a public proceeding before the police court in the city of Chicago, with reference to an unfortunate woman who had achieved much notoriety, and which had been pub-

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lished in reputable newspapers, and having ascertained those facts the article was reproduced in the city of Richmond. Where newspapers lightly and recklessly publish what is offensive and injurious to a citizen, courts and juries should hold them to a strict accountability; but it is by a reasonable enforcement of the law and not by its harsh and strained construction that the best interests of society are subserved. If an injury had been carelessly, recklessly or wantonly inflicted upon the reputation or feelings of an individual, the wrong doer should answer in damages; but it is the business of a newspaper to give news. The public demands it, and it is a condition of its existence, and we cannot discover from this evidence any ground whatever upon which to rest a claim for damages against the defendant in error.

There was no purpose in the publication in question to refer to the plaintiff in error. It is at most a case of mistaken identity, made not recklessly but after reasonable inquiry, and the trouble arises from a most unusual complication of facts and circumstances with reference to the name, occupation, and career of two individuals.

Upon the face of the publication, however, it is difficult to see how plaintiff in error could have appropriated it to herself. The concluding paragraph is quite sufficient to exclude the conclusion that there was any reference to her intended. It states that "the prisoner's husband, Sam Cody, died in England. Their son Vivien, is now with Colonel Cody, at the latter's ranch on the North Platte. The mother left 'Buffalo Bill' two years ago, and has since been drifting around the country with stray shows." There is not a fact here stated descriptive of the person referred to which applies to plaintiff in error. On the contrary, they do point with reasonable certainty to Mrs. Cody. It appears then that the person who alleges that she was in-

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jured by this publication was not known to the defendant, and was not referred to by the defendant. The *innuendo*, therefore, which alone points to the plaintiff in error wholly fails of proof, and the jury were plainly right in applying the facts to the instruction we have quoted, in finding that the defendant company did not refer to the plaintiff, Mrs. Butler, but to a person who was sometimes known as Any O'Klay, and used this title, stage or fanciful name in order to attract the notice of the public, and was not in its description or identification such as to lead those who knew or knew of the plaintiff to believe that the article was intended to refer to her.

Upon the whole case, we are of opinion that there was no error in the judgment of the Circuit Court.

Affirmed.

Statement.

Wytheville.

WRIGHT'S TRUSTEES v. WRIGHT AND OTHERS.

June 15, 1905.

1. CONVEYANCE FOR BENEFIT OF WIFE AND CHILDREN—*Case in Judgment—Construction.*—Upon a conveyance of property to a trustee to hold during the natural life of a married woman “for the joint use, benefit, profit and advantage of herself and her present and future children by” her present husband, with power to the wife to appoint the remainder in fee by her will, and with power to the trustee, during her lifetime, to change the investment upon the consent, in writing, of the wife—the changed investment to be held upon the same trusts—the children are entitled to a joint interest with their mother in the rents and profits of the trust subject during the continuance of the life estate.
2. DEEDS—*Grant of Estate—Subsequent Diminution—Construction.*—An estate or interest clearly granted or given in one part of an instrument will not be diminished or destroyed by words in another part of the instrument unless the terms which diminish or destroy the estate be as clear and as explicit as those by which it was granted or given.
3. WRITINGS—*Construction—Intention.*—In all cases of construction of written instruments the effort is to ascertain and give effect to the intention of the parties, and the whole instrument is to be looked to for such light as it may shed upon the particular language under consideration.

Appeal from a decree of the Hustings Court of the city of Petersburg, in a suit in chancery instituted by *Wright's Trustees v. Louisa Wright and others*, the beneficiaries in the trust. Louisa Wright and others appeal from decree construing deed of settlement.

Affirmed.

The opinion states the case.

Opinton.

William B. McIlwaine, for the appellants.

Hamilton & Mann, for the appellees.

CARDWELL, J., delivered the opinion of the court.

By deed bearing date the 12th of October, 1863, duly recorded on the following day, Albert Herzog and wife, in consideration of eight thousand dollars, cash in hand paid, conveyed to Charles Raitz a certain lot of land, situated in the city of Petersburg, described by metes and bounds, "*Upon trust, nevertheless, that the said Charles Raitz shall hold the same during the natural life of Louisa Raitz, wife of Casper Raitz, for the joint use, benefit, profit and advantage of herself and her present and future children by said Casper Raitz.*"

After the execution of this deed, those claiming as beneficiaries under it discarded the German name *Raitz* for its English equivalent, *Wright*, by which last mentioned name all the members of the family have been known for many years, and by that name will be spoken of in this opinion.

Charles Wright, the trustee in said deed, having departed this life, Bernard Mann and Richard D. Gilliam were, by an order of the Hustings Court of the city of Petersburg, entered October 30, 1900, appointed trustees in his place and stead; whereupon these substituted trustees filed the bill in this cause for the purpose of having a judicial construction of the trust created by the said deed.

It was the contention of one of the substituted trustees and of Louisa Wright and four of her children in the court below, that Louisa Wright took an exclusive equitable estate for life in the lot of land in question, and was, therefore, entitled to all

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the rents and profits therefrom, while the co-trustee and the two remaining children of Louisa Wright contended that all the children were entitled to share with their mother the rents and profits during the continuance of the life estate, and the lower court decreed in accordance with this latter contention, from which decree Louisa Wright and four of her children obtained this appeal.

The learned counsel for appellants concedes that if the words, "upon trust, nevertheless, that the said Charles Raitz shall hold the same during the natural life of Louisa Raitz, wife of Casper Raitz, for the joint use, benefit, profit and advantage of herself and her present and future children by said Casper Raitz," stood alone, the mother and the children would assuredly have taken a *joint* estate in the property for the life of the mother, whether the word "joint" had been used or not, but insists that the powers conferred upon Louisa Wright by the provisions of the deed, following the express trust it created, are wholly inconsistent with the idea that it was intended that her children should take a joint interest with her in the rents and profits of the trust property during her life, and that the case is controlled by the line of cases represented by *Stace v. Bumgardner*, 89 Va. 418, 16 S. E. 252; *Walke v. Moore*, 95 Va. 729, 30 S. E. 374; *Vaughan v. Vaughan*, 97 Va. 322, 33 S. E. 374; *Tyack v. Berkeley*, 100 Va. 296, 40 S. E. 904, 93 Am. St. 963; *Honaker v. Duff*, 101 Va. 675, 44 S. E. 900; especially relying upon the case of *Walke v. Moore*.

The provisions of the deed following that part of it creating the trust, set out above, are as follows: "And at her (Louisa Wright's) death shall convey and deliver the same to such person or persons as she may appoint by an instrument in writing executed by her as last wills and testaments may at that time

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be executed under the laws then in force, for which purpose full power and authority are hereby given said Louisa Raitz, notwithstanding her coverture, just as if she were a femme sole and unmarried, but should she die without making such instrument, then said trustee shall convey and deliver the same absolutely and in fee simple to said Casper Raitz, should he be then alive, but should he then be dead, then said trustee shall convey and deliver the same absolutely and in fee simple to such of his, the said Casper's children as may be then alive and the descendants of such as may be dead, such descendants taking *per stirpes*. Full power and authority are hereby given said trustee at any time with the consent in writing of said Louisa to sell said property and invest the proceeds in other property real and personal, which shall be held by him for the same objects and purposes as he holds the property hereinbefore conveyed, and with like consent from time to time to change such investment."

In *Walke v. Moore*, *supra*, an equitable fee simple estate was conveyed to the trustee, and the fact that the power was reserved to the wife to dispose of all the property by will, was considered by the court as inconsistent with an intention on the part of the grantor that the children should take a joint estate with their mother in the property conveyed. There, as the opinion says, "If the grantor had given to the children a joint estate with their mother in the property, he would not have conferred on her the futile power to give it away to other persons."

In the case before us, an estate for the life of Louisa Wright is created separate and distinct from the equitable fee simple estate in the property conveyed, and no power is conferred upon Louisa Wright or the trustee, with her consent, to defeat the joint interest of her children in this life estate, vested in them by the clear and explicit terms employed by the grantor, nor is the fact that she is given the power to dispose of the equitable

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fee simple estate in the property by will, nor the provision that Casper Wright should take it after the termination of the life estate, at all inconsistent with the intention that the children should share with their mother the rents and profits arising from the property during the existence of the life estate. The provision in the deed, that the trustee might, with the consent of Louisa Wright, sell the property and re-invest the proceeds in other property, to be held upon the same trust that the property sold was held, is the usual provision found in deeds of this nature, and merely left it to the mother's discretion to say when it was to the interest of herself and children that the investment should be changed. Authority is not given to Louisa Wright to sell and re-invest, but to the trustee, with her consent, and by the terms of the deed the new property was to be held upon the same trusts that the property sold was held, which is entirely consistent with the expressed intention of the grantor that the children of Louisa Wright should share jointly with her the rents and profits arising from the trusts subject during her life.

The opinion by Buchanan, J., in *Gaskins v. Hunton*, 92 Va. 528, 23 S. E. 885, sustained by the authorities cited, states concisely the rule applicable in the construction of the deed here under consideration, viz: "It is a settled rule of construction, both in deeds and wills, that if an estate is conveyed, or an interest given, or a benefit bestowed, in one part of the instrument, by clear, unambiguous and explicit words, such estate, interest, or benefit is not diminished nor destroyed by words in another part of the instrument, unless the terms which diminish or destroy the estate before given be as clear and decisive as the terms by which it was given."

The rule, as thus stated, is in entire harmony with the decisions of this court relied on by appellants, above named, wherein the intention to give to the woman alone and excluding her children

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is deduced from the context and the language of the instrument taken as a whole. It has been rightly said that in some of the cases wherein this subject was considered, unguarded expressions are used, but, upon the whole, the doctrine clearly established is that in construing deeds or wills, where the language of the grant or gift is to "the mother and her children," or to a trustee "for the benefit of the mother and her children," the children are excluded and the mother given a fee simple *only* where it appears from the context, or the whole instrument taken together, that such was the intention of the grantor or testator. In all cases the effort is to ascertain and give effect to the intention, and the whole instrument is to be looked to for such light as it may shed upon the particular language under consideration. *Fitzpatrick v. Fitzpatrick*, 100 Va. 552, 42 S. E. 306, 93 Am. St. Rep. 976, and authorities cited.

In the case at bar, we are unable to deduce from the language employed in the deed any intention on the part of the grantor to exclude the children of Louisa Wright from sharing jointly and equally with her during her life the rents and profits arising from the property conveyed, and it follows, therefore, that the decree appealed from must be affirmed.

Affirmed.

Syllabus.

Wytheville.**REAGER'S ADMINISTRATOR AND OTHERS v. CHAPPELEAR AND OTHERS.**

June 15, 1905.

Absent, Cardwell, J.

1. **EQUITY—Parties—Privies—Suit to Charge Administrator—Uniting Debtor of Decedent.**—Generally a distributee of an estate cannot maintain a suit against the personal representative of the decedent and another who is a debtor to the estate except under special circumstances, but where the debtor is a distributee of the estate, and a necessary party to the suit for the settlement of the fiduciary's account and a distribution of the proceeds, and it is charged in the bill that the fiduciary has not attempted to collect the debt due to his decedent's estate, and other facts are charged of such nature as would render a request to sue unnecessary, the bill may be maintained.
2. **EQUITY—Order of Reference Unexecuted—Harmless Error.**—Where an order of reference has not been executed the fact that it was improperly made is not assignable error.
3. **EVIDENCE—Answer—Admissions—Explanations.**—Where it is sought to charge a defendant by reason of admissions made in his answer to a bill the whole answer upon that question, if used at all, must be used and taken together, and explanations given must be used in connection with the admissions made; but if answer under oath is waived, and the facts admitted are clearly proved, independent of admissions in the answer, the defendant is not entitled to the benefit of qualifying explanations contained in his answer.
4. **EQUITY—Allegations and Proofs—Variance—Amended Bill.**—In a court of equity as well as in a court of law, the allegations and proofs must agree. A recovery will not be allowed in a case, although proved, which differs essentially from that alleged in the bill. If, on the coming in of an answer, the complainant discovers an error in the allega-

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tions of his bill he should correct it by amending his bill to conform to the facts. He cannot recover upon any new ground shown by the answer of which he does not avail himself by amending his bill.

Appeal from a decree of the Circuit Court of Rappahaunock county. Decree in favor of complainants. Defendants appeal.

Reversed in part.

The opinion states the case.

H. G. Moffett, for the appellants.

L. P. Carter, and *Munford, Hunton, Williams & Anderson*, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

The appellees, as distributees of the estate of Mrs. Nancy Reager, deceased, filed their bill against the appellants and another, all three of whom were also distributees. One of the appellants is her personal representative, and he and the other were alleged to be debtors to her estate. The object of the suit was to have a further settlement of the accounts of the personal representative, to require the debtor defendants to account for what they owed the estate, and for a distribution thereof between the parties entitled.

The appellants filed a demurrer to the bill, which was overruled, and that action of the court is assigned as error.

The first ground of demurrer, and the one chiefly relied on in this court, is that "there is no such privity of interest between the plaintiffs and defendants as entitled them to bring this suit."

It is well settled that the distributee of a decedent's estate cannot maintain a suit against the personal representative of the

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decedent and another who is a debtor to the estate, except under special circumstances. *Beatty v. Downing*, 96 Va. 451, 454, 31 S. E. 612; *Conrad v. Fuller*, 98 Va. 16, 34 S. E. 893. What constitutes such special circumstances as will justify such a joinder have never been limited by any precise and rigid rule. *Same authorities.* The circumstances usually relied on and which have been held sufficient to authorize such joinder are the insolvency of the personal representative, collusion between him and the debtor, and the fact that the debtor was a trustee holding property of the decedent, or his agent. *Same authorities and cases cited.*

The circumstances relied on in this case to take it out of the general rule are that all the parties defendant were necessary parties in a suit for the settlement of the accounts of the personal representative and a distribution of his decedent's estate; that while the bill does not expressly charge collusion between the personal representative, B. M. Latouraudais, and his sister and co-defendant, Mrs. Miller, the alleged debtor of his decedent's estate, the allegations of the bill taken together do amount to such a charge; that the bill alleges that the administrator and Mrs. Miller lived together very near to the decedent, who was their aunt, and with whom they were on most intimate terms; that the decedent was an old woman and entrusted the management of her business affairs largely to them, who thus had charge of the collection and handling of money which became due and payable to her from time to time; that they acted together in this capacity as best suited their convenience; that on several occasions, which are specifically stated, sums of money were paid over to one or the other of them, and that each was indebted to the decedent's estate in at least the sum of \$1,000.00; and that the personal representative had not charged himself with any of his said indebtedness to the estate, nor had he attempted to collect what Mrs. Miller owed the estate.

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If there had been an allegation in the bill that the personal representative had been requested to sue Mrs Miller and had refused to do so, the case would be free from all doubt. Whilst such a request should generally be made, the facts alleged in the bill may be such as to render such a request unnecessary. *Hagan v. Walker*, 14 Howard 29, 14 L. Ed. 312.

The facts and circumstances alleged in the bill were sufficient, we think, to entitle the appellees to bring this suit, especially as all the parties to the suit were necessary parties for the settlement and distribution of the decedent's estate.

The other grounds of demurrer were also properly overruled.

The next assignment of error is to the action of the court in directing one of its commissioners to take an account of all moneys collected by Mrs. Miller and her brother, or either of them, which belonged to Mrs. Reager, because the order of reference was entered upon the allegations of the bill unsupported by any evidence whatever.

It is well settled, as the appellants insist, that an order of reference should not be made to enable the complainant to make out his case, and that he must first make good the charges of his bill, showing that he has the right to demand an account. *Millhiser, &c. v. McKinley, &c.*, 98 Va. 207, 35 S. E. 446; *Bresee v. Bradfield*, 99 Va. 331, 337, 38 S. E. 196. But, as no account was taken under the order, the error complained of was harmless, and is no ground for reversal. *Bresee v. Bradfield, supra*.

Upon a hearing of the cause upon the bill, answers of the appellants, replications thereto and the depositions of witnesses taken by the appellees, the Circuit Court was of opinion that the said "Latouraudais is indebted to the estate of Nancy Reager, deceased, in the sum of one hundred and thirty-two dollars and fifty cents, with interest thereon from December 31, 1900, and that Mary E. Miller is indebted to the estate of Nancy Reager,

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deceased, in the sum of four hundred and fifty dollars, with interest from September 1, 1898, for which said sum the said B. M. Latouraudais, administrator, . . . is liable, the court doth adjudge, order and decree that Commissioner C. H. Keyser take and state a further settlement of the administration account of the said B. M. Latouraudais . . . taking as correct the settlement made by him in the suit of *Reager v. Reager*, but said commissioner is directed to charge said administrator with the said sum of one hundred and thirty-two dollars and fifty cents, with interest from December 31, 1900, and the further sum of four hundred and fifty dollars, with interest from September 1, 1898; and the said commissioner is directed to report the parties entitled to the funds as shown by said settlement, and in what proportion . . .”

The appellant, Latouraudais, in his own right and as administrator, assigns as error the action of the court in charging him with the sum of \$132.50. This sum was the price of certain rent corn belonging to Mrs. Reager which Mr. Latouraudais, in his answer, admits he received, but states along with his admission that he paid it over to Mrs. Reager.

If the statements in his answer were the only evidence of his liability, it would have been error to have charged him with that sum; for the whole of the answer upon that question, if used at all in support of the bill, must be used and taken together; explanations given must be used in connection with the admission made. *Morrison's ex'ors v. Grubbs*, 23 Gratt. 342, 349; *Clinch River, &c. Co., v. Harrison*, 91 Va. 122, 21 S. E. 660.

Answer under oath was expressly waived, and the fact that Mr. Latouraudais had received the price of the rent corn was clearly proved, independent of his admission, and, there being no evidence that he had paid the money over to Mrs. Reager, he

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was, under all the facts and circumstances proved in the case, chargeable with that sum.

The action of the court in holding that Mrs. Miller was indebted to the estate of Mrs. Reager in the sum of \$450, and in decreeing that her administrator should be charged with that sum, is also assigned as error.

In the bill it is charged that a Mr. Huffman borrowed the said sum of \$450 from Mrs. Reager, and when it was returned he paid it to Mr. Latouraudais. Mr. Latouraudais in his answer denies that such sum or any part of it was ever received by him. Mrs. Miller in her answer admits that some years before "Mr. Huffman handed respondent about that sum of money which he had borrowed from Mrs. Reager, as respondent was informed, with the request upon the part of Mr. Huffman that respondent would hand the same to Mrs. Reager," which she did. Mr. Huffman, who was one of the complainants in the cause, testified that he paid the \$450 to Mrs. Miller, and that the allegation in his bill that he paid it to Mr. Latouraudais was an error.

Upon the case made, no decree could properly be rendered for the \$450. In a court of equity, as well as in a court of law, the allegations and the proofs must agree. A recovery will not be allowed in a case, although proved, which differs essentially from that alleged in the bill. *Wrenn v. Moncure*, 95 Va. 369, 374, 28 S. E. 588, and cases cited; *Millhiser, &c. v. McKinley, &c.*, *supra*. Note to *Harris v. Harris*, 2 Rand. 451, in *Michie's Va. Rep. Anno.*, bottom page 371, where the cases are cited.

When the answers were filed in this case, if the appellees wished to hold Mrs. Miller liable for the \$450, they should have amended their bill. Having failed to do this, they can only recover according to the allegations of the bill. They cannot recover upon any new ground which was shown by her answer, of which they did not avail themselves by amending their bill.

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If Mrs. Miller was to be condemned from the statements of her answer, she ought to have had the benefit of the whole answer. If her answer is to be taken as true as to the fact that Huffman handed her the money for Mrs. Reager, it must also be taken as true that she delivered it to Mrs. Reager. See Judge Brockenbrough's opinion in *Rib v. Martin*, 5 Leigh 140, 142; *Millhiser v. McKinley*, *supra*; *Bresce v. Bradford*, *supra*.

The appellees had no right under their bill to recover the \$450 from Mrs. Miller, no matter what their proof was, because they had not alleged that she owed it. They had no right to recover it on her answer, because it showed that she was not liable. Neither was Mr. Latouraudais chargeable with it under the pleadings and proofs in the cause, either in his individual or representative capacity. The money was never received by him for Mrs. Reager and he could not be charged with laches in failing to collect it from Mrs. Miller until it was established that she owed it.

We are of opinion, therefore, that the said decree, in so far as it charges Mrs. Miller and the personal representative of Mrs. Reager with the \$450, was erroneous, and to that extent must be reversed and annulled, and in other respects affirmed and that the decree overruling the demurrer and directing an account must be affirmed.

Reversed in part.

Syllabus.

Wytheville.

WEST v. CITY OF NEWPORT NEWS.

June 15. 1905.

Absent, Cardwell, J.

1. **BANKS—Capital Stock.**—"Capital" and "Capital Stock" of a bank, while sometimes used interchangeably, are not one and the same thing. "Capital" includes the entire assets of the bank whether represented by money paid in for stock, surplus, undivided profits or other property of the bank while "capital stock" represents only the total amount derived from the issuance of the shares of stock.
2. **BANKS—Taxation—Capital Stock.**—All legislative acts are presumed to be lawful, and are to be so construed unless the contrary plainly appears; and as the capital of banks is exempt from taxation, a city ordinance imposing a tax on the "capital stock" of banks will be construed to refer to the totality of shares of the individual stockholders which the city has the right to tax.
3. **BANKS—Taxation—Shares of Stock—Municipal Ordinances.**—A city ordinance imposing a tax on "all personal property of every description, including the capital stock of banks," is broad enough to cover a tax levied on shares of stock of a bank in the hands of a stockholder even if the use of the words "capital stock" showed an intention to tax the capital of banks. The added words "including the capital stock of banks" give no further meaning or force to the comprehensive words which precede them.
4. **BANKS—Taxation by Cities—Shares of Stock—Valuation.**—Bank stock being assessed for taxation by the State, and cities being compelled by statute to follow that assessment, a city ordinance imposing a tax of so much on the assessed value of the "capital stock" of banks located in the city is a sufficient compliance with the statute requiring bank stock to be assessed at its market value. The term "assessed value" has reference to the assessed value for State taxation, which the city has to follow. When the State has assessed the value of bank stock for the purpose of taxation and no objection is made to that assessment, none can be made to a city ordinance which adopts it.

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Error to a judgment of the Corporation Court of the city of Newport News on a motion to correct an erroneous assessment of bank stock for taxation. Judgment for defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Bickford & Stuart and *A. C. Garrett*, for the plaintiff in error.

J. A. Massie, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This motion was made by the plaintiff in error under section 571 of the Code for the correction of an alleged erroneous assessment of taxes, whereby he was charged by the defendant in error with \$148.50, city taxes for the fiscal year 1903-'4 on four hundred shares of the stock of the Citizens and Marine Bank of Newport News, of the assessed value, for the purpose of State taxation, of \$16,500; upon consideration whereof the lower court held that the taxes complained of were legally assessed and levied, and dismissed the application for relief therefrom.

The plaintiff in error claims to be aggrieved by this action of the lower court in the following particulars: Because (1) the ordinance of the city of Newport News, approved June 17, 1903, imposing taxes on personal property, attempted to impose a tax on the capital stock of the banks of said city instead of laying such tax upon the shares of stock of the individual stockholders, and that such an ordinance is invalid, and, being invalid, no legal tax was thereby assessed or levied either upon the shares of a stockholder or the capital stock of the bank. (2)

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That even if a legal tax was imposed by the ordinance, the city authorities did not follow the mode of assessment and manner of collection prescribed by statute for the collection of State taxes upon shares of stock. (3) Because section 86 of the city charter, under which it is alleged the shares were assessed, if a tax was imposed on them, is unconstitutional and void. (4) That the ordinance imposing the tax is unconstitutional and void.

The ordinance in question, which was approved June 17, 1903, is as follows:

"Be it ordained by the Common Council of the city of Newport News, that for the fiscal year beginning on the first day of February, 1903, the taxes on lands and lots and the improvements thereon, persons, incomes, and other property for the payment of the interest on the city debt, and to meet the appropriations for the fiscal year of 1903 and 1904, beginning July 1, 1903, shall be as follows: Upon all lands, lots and improvements thereon, wharves and upon all personal property of every description, including the capital stock of banks located in this city, except such real and personal property as is exempted from taxation by the laws of the State of Virginia, or any ordinance of this city, ninety cents on every hundred dollars of the assessed value thereof."

The facts certified show that, by virtue of the authority vested in him by this ordinance and the general law, the commissioner of the revenue assessed the value of the shares of stock of the plaintiff in error along with the value of the shares of stock of the other stockholders in the Citizens and Marine Bank, and levied a tax against each of such stockholders in favor of the city of Newport News, following the mode of assessment and the manner of collection prescribed for the assessment of State taxes upon such shares of stock, under the statute authorizing a tax upon the shares of stock in banks, for State purposes; that the

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assessment list used by the commissioner was a *fac simile* of and in exact conformity with that used for the assessment and collection of taxes for State purposes, and contained an alphabetical list of all the stockholders of the Citizens and Marine Bank furnished for such purposes by the Auditor of Public Accounts, duly filled out by the cashier of the bank, and showing the number of shares of each stockholder. It is not pretended that the valuation upon which the shares of stock are taxed is erroneous, nor could such a contention be made as the fact is shown that the tax is levied upon the same assessment made for the purposes of State taxation, the correctness of which is not questioned.

If the valuation for State purposes is correct, it follows that the assessment is correct for city purposes, as the law provides that: "in cities and towns the assessment of real estate and personal property, for the purpose of municipal taxation, shall be the same as the assessment thereof for the purpose of State taxation, whenever there shall be a State assessment of such property." *Const. Va.*, section 128; *Va. Code 1904*, section 1033h.

This proceeding is not, therefore, a motion to correct an erroneous assessment of valuation, as usually understood, but it is to avoid the payment of taxes upon a correct assessment of valuation, upon the ground that the levy has not been legally made. That the city has the authority to levy a tax upon the State assessment of this bank stock cannot be questioned, as section 1040a of *Va. Code 1904* gives it such power in express terms, the language of that section being in part as follows:

"(1) *Hereafter each county or city in which any bank, either national or State, is so located may, subject to the conditions mentioned below, tax all the shares of stock issued by any such bank so located within its limits at the same rate as is assessed upon other moneyed capital in the hands of individuals residing*

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in such county or city. (2) That in so taxing said shares the said county or city authorities, respectively, shall follow the mode of assessment and manner of collection prescribed by statute for the collection of State taxes upon said shares. . . .

The ordinance in question imposes a tax of ninety cents on every one hundred dollars of the assessed value of all personal property of every description, "*including the capital stock of banks located in this city.*" The contention is that, by the use of the words "including the capital stock of banks located in this city," the council attempted to impose a tax on the capital of the banks instead of laying such tax upon the shares of stock of the individual stockholders.

The statute does not use the term "capital stock" in providing for the exemption mentioned, but employs the word "capital" alone. The language is, "No tax shall be assessed upon the *capital* of any bank," &c. *Acts 1902-'3-'4*, section 17, p. 163. "Capital" and "capital stock," while sometimes used interchangeably are not one and the same thing. "Capital" includes the entire assets of the bank, whether represented by the money paid in for the issuance of stock, surplus, undivided profits or other property of the bank, and may vary from time to time according to its profits or losses while "capital stock" is fixed and definite and represents only the total amount derived from the issuance of the shares of stock.

In the case of *Union Bank v. Richmond*, 94 Va. 316, 26 S. E. 821, it is said, that "the property or interest of a stockholder in an incorporated bank, commonly called a share, the shares in the aggregate totality being sometimes called the "capital stock" of the bank, is a different thing from the moneyed capital of the bank held and owned by the corporation. This capital may consist of cash, or of bills and notes discounted, or of real estate

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combined with these. . . . In whatever it may be invested, it is owned by the bank as a corporate entity, and not by the stockholders. A tax upon this capital is a tax upon the bank." This is a different thing from taxing the shareholders or stockholders, upon the value of their stock. All legislative acts are presumed to be lawful, and are to be construed as such unless the contrary plainly appears. Since, then, the capital of banks is exempt from taxation, the term "capital stock" used in the ordinance clearly had reference to the totality of shares of the individual stockholders which the city had the right to tax. The purpose of the ordinance is made manifest by the fact that in its execution no attempt has ever been made to tax the capital of the several banks of the city, but the assessment and levy has been upon the individual stockholders.

If, however, it were conceded that the use of the words "capital stock" showed an intention to tax the capital of banks, the result would be the same, for we concur in the view taken by the lower court, that the words "all personal property of every description," are broad enough to levy a tax against all kinds of personal property whether tangible or intangible. That bank stock is personal property would seem to be settled by section 1173a, sub-section 7, Va. Code 1904, wherein it is declared to be personal property, and by section 5, sub-section 10, Va. Code 1904, which defines personal estate to include chattels, real and such other estate as, upon the death of the owner intestate, would devolve upon his personal representative.

This court has held that bank stock is property to be assessed like any other property. *Burrows v. Smith, Treas.*, 95 Va. 694, 29 S. E. 674; *Union Bank v. Richmond, supra*. As the words, "all personal property of every description," used in the ordinance are general terms, they include all kinds of personal property, whether tangible or intangible. Shares of bank stock

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being personal property, and therefore embraced by the words, "all personal property," the added words "including bank stock" gave no further meaning or force to the ordinance than it had without them. Where words of a general description are used, they cover everything of that kind not expressly or by necessary implication excepted.

The contention that the city authorities did not follow the mode of assessment or manner of collection prescribed by statute for the collection of State taxes upon shares of bank stock is not sustained by the record. As already pointed out, the contrary appears from the facts certified.

It is argued that because the words, "assessed value," are used in the ordinance instead of the words "market value," that the council did not intend to levy a tax upon bank stock.

This view is, we think, without merit. There being an assessment of this stock for State purposes, the city followed, as it was obliged to do under the statute, the State assessment. The stock had already been assessed by the State at its market value, and no question is raised here as to the correctness of that valuation. The ordinance in using the term "assessed value" had reference to the assessed value for the purposes of State taxation, which the city had to follow, and was not intended to and did not in fact prejudice the right of the stockholder to have his stock assessed at its market value.

As to the contention that section 86 of the charter of Newport News is unconstitutional, it is sufficient to say, that the assessment complained of was not made under that section and, therefore, it has no application to the case at bar. Section 86 of the charter applies only where there is no State assessment. Here there is a State assessment and, as shown, section 128 of the Constitution and section 1033h of Va. Code 1904, provide that in cities and towns the assessment of real estate and personal

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property for the purpose of municipal taxation, shall be the same as the assessment thereof for the purpose of State taxation, *whenever there shall be a State assessment of such property.*

Upon the whole case, we are of opinion that the ordinance in question is constitutional, that the assessment complained of has followed the law, and the tax sought to be avoided has been properly levied. The judgment of the lower court must, therefore, be affirmed.

Affirmed.

Statement.

Wytheville.

BISHOP v. BAGLEY AND OTHERS.

June 15, 1905.

1. EMINENT DOMAIN—*Report of Commissioners—Failure to Sign—Adoption.*—Where commissioners appointed to enquire and report upon the propriety and expediency of flooding land by mill-dam meet upon the land and agree upon a report which they authorize one of their number to write out and sign for them, and such report is so written out and signed, and afterward acknowledged and adopted by all the commissioners in open court, this is a reasonable and sufficient compliance with the law.
2. EMINENT DOMAIN—*Flooding Land—Report of Commissioners—Conclusive Effect.*—The report of commissioners, duly appointed under the provisions of section 1349 of the Code 1901, that if leave is granted to erect a mill-dam at a given place "the health of the neighborhood will be annoyed by the stagnation of water caused by said pond producing malaria, chills and fever," is under the provisions of section 1353 of Code of Va. 1901, conclusive against the applicant to erect the dam, and no evidence will be heard against it.

Error to a judgment of the Circuit Court of Lunenburg county in a proceeding to re-establish a mill and dam. Judgment for defendants. Petitioner assigns error.

Affirmed.

The opinion states the case.

Wm. E. Neblett and Meade Haskins, for the plaintiff in error.

A. B. Dickinson, for the defendant in error.

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KEITH, P., delivered the opinion of the court.

Appellant, Bishop, presented his application in writing to the County Court of Lunenburg county for the re-establishment of a mill and mill dam, on Flat Rock Creek, and in February, 1901, the County Court pronounced an order appointing commissioners to investigate and report upon the subject, as provided by the Code of 1887, section 1349. From time to time such proceedings were had in the County Court that on the 13th of August, 1901, an order was entered refusing the application; and thereupon Bishop appealed to the Circuit Court, where the judgment of the County Court was reversed and the matter retained for further proceedings.

At the November term, 1901, the Circuit Court appointed five commissioners, four of whom made a report to the April term, 1902. To this report numerous exceptions were taken, and the court, being of opinion that the report was not sufficiently definite with respect to certain matters of inquiry, set aside the report and appointed a new commission consisting of five persons. Three of these commissioners acted, and made their report to the November term, 1902. To this report appellant filed numerous exceptions, and at the May term, 1903, an order was entered dismissing his application, and he thereupon obtained an appeal from one of the judges of this court.

There are numerous assignments of error, of which we shall consider only two.

The final report in the case was excepted to by appellant upon the ground that it was signed by only one of the commissioners appointed. From the bill of exceptions it appears that the three commissioners met and acted together, and directed one of their number to prepare their report, embodying the results of their inquiry and deliberation. This duty was performed by

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T. C. Maddux, who drew up the report and signed his own name to it and also the names of the other two commissioners. Some time thereafter L. A. Gee saw the report and adopted it. J. S. Saunders, the other commissioner, had never seen the report until it was read to him in open court, but having heard it he declared that it correctly stated his views, and that the commissioners had authorized one of their number to prepare and sign the report because they lived in different sections of the county and it was not convenient for them to perform the work together in one day. And thereupon the report and the signatures thereto, as made by T. C. Maddux, were duly acknowledged in open court by the commissioners for whom he had signed.

This seems to us a reasonable and sufficient compliance with the law, and the exception to the report on that account was properly overruled by the Circuit Court.

The other ground of exception to which we shall allude, and which being decisive of the case obviates the necessity for dealing with any other, is to that part of the report which states that "if said leave is granted to erect said mill dam at said place, the health of the neighborhood will be annoyed by the stagnation of water caused by said pond producing malaria, chills and fever." In support of his exception, appellant offered to show by the testimony of numerous witnesses that the re-establishment of the dam would not affect the health of any one. But the court refused to hear testimony upon the subject, and overruled the exception.

So much of section 1353 of Va. Code, 1904, as bears upon this point is as follows: "If, on the report, or on other evidence, it appears to the court that by granting such leave the mansion house of any person other than the applicant himself, or the outhouses, yard, garden, or orchards thereto belonging, will be

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overflowed or taken, or that the health of the neighbors will be annoyed, the leave shall not be granted."

In *Mayo v. Turner*, 1 Munf. 405, Judge Tucker say that "the only question in this case is whether the inquest of the jury finding that the health of certain persons in the neighborhood, of whom appellee's family were a part, will be annoyed by the erection of a mill-dam, &c., be conclusive against the petitioner; or whether it be competent for him to examine witnesses to impugn that finding. . . . The fifth section enacts, that 'if, on such inquests, or on other evidence, it shall appear to the court that certain inconveniences may result, or the health of the neighbors be annoyed, they shall not give leave to build the mill and dam.' From hence it appears to me that if the opinion of the jury be affirmative, that the health of the neighbors will be annoyed, the same is conclusive against the party applying to build the mill; but that, if it be merely negative, a person supposing himself likely to be aggrieved thereby may controvert such opinion of the jury by other evidence; and, if by such other evidence, it shall appear to the court that the health of the neighbors will be annoyed, they are bound by the terms of the law not to give leave to build the mill." This opinion was concurred in by all the judges.

In *Miller v. Trueheart*, 4 Leigh, 570, speaking of the statute under consideration, the court said: "A glance at its provisions will show how exceedingly careful it has been of the health of the citizen. The jury is directed to inquire and report, whether in its opinion the health of the neighbors will be annoyed by the stagnation of the waters. If the jury reports that no such annoyance will take place, any person may contest the truth of the statement and produce evidence before the court; and if upon this evidence, the court shall think that the jury is wrong, it will refuse leave to erect the mill; if, on the contrary, the jury reports

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that the health of any part of the neighbors will in its opinion be affected, or will probably be affected, this is conclusive; no evidence can be adduced to controvert it; for the law says, that in such case the court shall not give leave to build the mill, and erect the dam." And the case of *Mayo v. Turner, supra*, is cited with approval.

It is true that at the time *Mayo v. Turner* was decided, and when it was followed in *Miller v. Trueheart*, the statute provided for the impaneling of a jury, and it is contended that commissioners having been substituted for a jury the authority of those cases has been impaired.

A comparison of the statutes will show that the only change in phraseology is that the former statute says that "if on such inquests, or on other evidence," while the present statute says, "if on the report, or on other evidence" it appears that the health of the neighbors will be annoyed, the leave shall not be granted.

We have then the statute law, which was interpreted by this court nearly a century ago; a revision and re-enactment of the statute law in 1849, and the substitution of the report of commissioners for a jury of inquest, the language of the statute in other respects remaining unchanged. This seems to us to be a legislative endorsement of the judicial construction, and places it outside the region of further controversy until the legislature shall see fit to interpose.

Upon the whole case, we are of opinion that there is no error in the judgment of the Circuit Court, which is affirmed.

Affirmed.

Statement.

Wytheville.

PEOPLES NATIONAL BANK v. VIRGINIA TEXTILE CO. AND
OTHERS.

June 15, 1905.

Absent, Cardwell, J.

1. **RECEIVERS—Debts Created by—Liability of the Fund.**—Generally the appointment of a receiver does not affect vested rights or interests of third persons in property which is the subject of the receivership, or disarrange the order of priority of existing liens, but where the receiver is appointed at the instance and for the benefit of lien creditors, and is charged with the duty of operating the property for their advantage, all proper charges, expenses, and liabilities incurred incident to the receivership are held to be a first charge not only upon the current earnings, but also on the *corpus* of the estate.
2. **RECEIVER'S LIABILITIES—Ascertainment—Order of Reference.**—In the absence of other proper evidence of the liabilities of the receiver chargeable on a fund under the control of the court, the cause should be referred to a commissioner to enquire into and take evidence touching the same; and, when allowed, the decree for their payment should specify the amount of each claim, and fix the date from which interest is to be computed.

Appeal from a decree of the Corporation Court of the city of Lynchburg. Decree in favor of defendants. Complainant appeals.

Affirmed in part.

The opinion states the case.

~~For~~

Caskie & Coleman, for the appellant.

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Jno. H. Lewis, L. D. Lewis, James E. Edmunds, Wilson & Manson, Jno. W. Harvey and Harrison & Long, for the appellees.

WHITTLE, J., delivered the opinion of the court.

This case is within narrow limits and practically presents a single question for decision.

It was a suit in equity, instituted by the appellant for the ultimate purpose of enforcing the lien of a deed of trust upon the plant of the appellee, the Virginia Textile Company, to secure coupon bonds to the amount of \$25,000, all of which were held by the plaintiff. The bill was filed in open court, and the defendants were the Textile Company and the trustees in the deed of trust, who were also attorneys for the plaintiff, and one of whom was president of the bank.

The bill alleged the indebtedness of the Textile Company to the plaintiff, and their default in payment of certain notes and instalments of interest on the coupon bonds; that plaintiff was informed that some of the defendant's goods which had been shipped to the city of New York for sale had been attached by a creditor; and that other creditors were threatening to levy attachments upon its property; that the company had at great expense established valuable business connections, and organized and educated a force of skilled laborers, which, if disbanded, could not be replaced; that the retention of both the customers and employees was essential to maintain the value of the plant and other assets; and that the business was being conducted at heavy cost and daily loss. In order, therefore, to prevent the loss and damage which would result from a scramble among creditors for priority, and a wasting of the assets by a multiplicity of suits, the bill prayed for the appointment of a re-

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ceiver to continue the business of the company under the direction of the court, and with such powers and authority as it might be deemed wise to bestow upon him; and for the usual relief afforded in such proceedings.

The defendants answered the bill, admitting the truth of its allegations and uniting in its prayer. Thereupon a decree was passed by the court, appointing the president of the bank receiver, with direction to take possession of all the company's property, which included not only the plant on which the plaintiff had the first lien, but other property, some of which was primarily liable for supply claims. The decree also invested the receiver with large powers, authorizing him to carry on the business and operate the property as a textile mill, "at the cost and risk of the fund," using the assets as a basis of credit; and, in order that he might be free-handed in the discharge of his duties, he was protected by injunction from interference either by the company, its agents and officers, or by creditors; the latter being required to litigate their demands in that suit.

When the receiver took charge of the business, the estimated value of the assets was \$68,027.51, consisting of—

Machinery and equipment.....	\$53,773 88
Office furniture.....	260 65
Supplies on hand.....	10,801 43
Due from sales agent.....	3,191 55

The receiver died about one year after his appointment, and his management was attended with serious loss. With the exception of the original plant and \$2,102.19 paid to supply claim creditors, the assets of the company were consumed or lost, leaving a balance of \$3,013 still due on supply claims, and additional liabilities created by the receiver amounting to several thousand dollars.

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Subsequently, the plant was sold by decree of the court, the bank becoming the purchaser at the price of \$15,975. It paid the costs and expenses of sale, but claimed the right to apply the residue of the purchase money to the coupon bonds secured by the deed of trust as the first lien on the property.

The legality of that contention, the result of which, if sustained, would be to exonerate the property sold from responsibility for both the amount of assets diverted from the payment of supply claims, and also for liabilities incurred by the receiver, presents the main question in controversy.

The decision of the lower court was adverse to the pretension of the bank, and it was decreed to pay a sufficient amount of the purchase money to discharge all the other indebtedness and the costs of the suit.

The general rule is conceded, that the appointment of a receiver does not affect vested rights or interests of third persons in property which is the subject of the receivership, or disarrange the order of priority of existing liens. But this principle is subject to an exception as firmly established as the rule itself, namely, that where the receiver is appointed at the instance and for the benefit of lien creditors, and charged with the duty of operating the property for their advantage, all proper charges, expenses and liabilities incurred incident to the receivership are held to be a first charge upon not only the current earnings but also the *corpus* of the estate.

The case in judgment comes fully within the influence of the foregoing exception, and the trial court correctly so held. *Miltenberger v. Logansport*, 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117; *Kneeland v. American L. & T. Co.*, 136 U. S. 89, 10 Sup. Ct. 426, 34 L. Ed. 1052; *Kneeland v. Luce*, 141 U. S. 491, 12 Sup. Ct. 32, 35 L. Ed. 830; *Chicago, &c. v. McNulta*, 153 U. S. 553, 561, 14 Sup. Ct. 915, 38 L. Ed. 819; *Cake v.*

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Kohun, 164 U. S. 311, 17 Sup. Ct. 100, 41 L. Ed. 447; *Metropolitan, &c. v. Tonawanda, &c.*, 103 N. Y. 245, 8 N. E. 488. See also *Karn & Hickson v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. 431; *Osborn v. Big Stone Gap, &c. Co.*, 96 Va. 58, 30 S. E. 446; *State Bank v. Domestic, &c. Co.*, 99 Va. 411, 39 S. E. 141, 86 Am. St. 891.

It appears, however, that the only evidence of the amount and correctness of the debts alleged to have been incurred by the receiver is furnished by a list appended to the report of the administrator of the receiver. The accounts there listed aggregate \$2,721.83, and there was a general provision in the decree for their payment.

There ought to have been a reference to a commissioner to inquire into and take evidence touching these debts; and, if allowed, the decree for their payment should set forth specifically the amount of each claim and the date from which interest is to be computed. *Spoor v. Tilson*, 97 Va. 279, 33 S. E. 609.

Under Rule IX, the Lynchburg Building Company assigns as error the failure of the court to make provision for the payment of the rent of its building occupied by the receiver.

It appears that the amount of that claim is in dispute, and it also should be made the subject of a reference to a commissioner.

The decree appealed from must, therefore, be affirmed on the main question involved, but reversed in the particulars indicated, and remanded for further proceedings to be had in conformity with the views expressed in this opinion.

Affirmed in part.

Statement.

Mytheville.

WINFREE v. JONES.

June 15, 1905.

Absent, Cardwell, J.

1. **BANKRUPTCY—Provable Debts—Liability for Torts.**—A claim for damages for negligently permitting plaintiff's house to be destroyed while in the possession of the defendant as tenant is not a provable debt under the acts of Congress relating to bankruptcy, and hence a discharge in bankruptcy is no answer to an action to recover such damages. Liabilities arising purely *ex delicto* are not provable under said acts.
2. **PROXIMATE CAUSE—Natural and Probable Result.**—The law always refers an injury to the proximate, not to the remote cause. To warrant the finding that an act of mere negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, and that it ought to have been foreseen in the light of the attending circumstances.
3. **DAMAGES—Proximate Cause—When a Question for Jury—When for Court—Case at Bar.**—When there is doubt as to what damages should be considered as flowing, in a natural and continuous sequence, from an act of negligence, the question should be left to the jury, but leaving the upstairs door of an empty house unlocked is so manifestly not the proximate cause of the subsequent burning of the house by some one who had no legal right there, but who obtained access by reason of the unlocked door, that the court may so declare as a matter of law.

Error to a judgment of the Corporation Court of the city of Newport News in an action of Trespass on the Case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

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Jno. W. Friend, for the plaintiff in error.

C. C. Berkeley and *C. C. Mitchell*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

M. B. Jones, the plaintiff in the court below, brought this action to recover damages of the defendant, W. B. Winfree, for having, as alleged, negligently permitted a certain house to be burned while it was in his possession as tenant to the plaintiff, by abandoning it and leaving it unlocked so that it was wrongfully entered, burned, and destroyed.

There was a verdict of \$300 for the plaintiff, upon which judgment was entered by the lower court, and thereupon this writ of error was awarded.

The first error assigned is the action of the lower court in rejecting a plea of bankruptcy tendered by the defendant.

The discharge, which was obtained October 23, 1903, on its face releases the defendant from liability for all claims which are made provable by the acts of Congress relating to bankruptcy. The question presented, therefore, is, whether the claim here asserted was provable under the acts of Congress relating to bankruptcy.

It is to be observed that the claim is for unliquidated damages, and arises *ex delicto*. The act of Congress has been construed, with respect to such claims, by the Federal courts adversely to the right to prove them. *Beers v. Hanlin* (D. C.), 99 Fed. Rep. 695; *In re Hirschman* (D. C.), 104 Fed. Rep. 69.

In the case last cited, after a well considered discussion of the entire subject, pointing out the several classes of claims that are provable under the act of Congress, the court says: "The care

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used to particularize various provable debts in sub-section "a" negatives the extended construction of sub-section "b" urged by petitioners. If the latter sub-section authorizes the liquidation and subsequent proof of damage *ex delicto*, the whole subject could have been covered in very general language. Assuming petitioner's construction of section 63, sub-section "b," it would embrace claims arising from any tort. There is no language in the section which can be held to include some, and not all, torts. Yet the general policy of bankrupt acts has been not to include in provable debts claims for damages for personal wrongs. It is hardly possible, if Congress had intended such a departure from the history of bankrupt legislation, that it should not have expressed the intent unmistakably." After showing the necessity for the petitioners bringing themselves under section 63, sub-section "a" in order to prove their claims, the court says: "section 63, sub-section 'a' does not authorize the proof of any claim arising *ex delicto*, unless a recovery may be had *quasi ex contractu*."

This case is conclusive of the question at bar. The plaintiff could not have waived the tort and sued *ex contractu*. His claim rested entirely in tort. There was no contract of renting with covenant thereunder upon which he could have based an action *ex contractu*.

In the view we take of the merits of this case, the only remaining assignment of error necessary to be considered is that which relates to the action of the court in refusing to set aside the verdict of the jury as contrary to the law and the evidence.

It appears from the record that early in July, 1901, the plaintiff rented the house in question, situated in a negro community known as "Klondike," to the defendant for one year from July 10, 1901; that the defendant remained in the house until the 8th or 9th of December, 1901, when he moved out,

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leaving the door of the upstairs which opened on a porch connected by steps with the street below, unlocked and insecure, that when the defendant moved out, the plaintiff, on the 10th of December, 1901, sued out an attachment against him and recovered, December 26, 1901, judgment for \$280 and costs, covering the rent to accrue for the whole year up to July 10, 1902, which judgment was subsequently paid by the defendant; that on the 30th or 31st of December, 1901, about midnight, the house was burned and totally destroyed; the fire breaking out in the rear part of the second floor of the building, the entrance to which was through the door opening on the upper porch which had been left unlocked. It was agreed that two negroes would testify that several times prior to the fire a negro known as "Big Jim" was seen passing in and out of the upstairs of the house, and loafing about a bar-room on the opposite side of the street during the afternoon of the day proceeding the fire, and that one witness would testify that a large man, whether white or black, not known, was seen running down the steps from the upstairs of the house just after the fire appeared in the part of the building where the door and windows entered. It is proper to say that the record furnishes no pretense or suggestion that the defendant had anything to do with the burning of the building other than the alleged negligence of leaving the door unlocked. The record shows that the plaintiff knew that the defendant had abandoned the house; indeed, as already seen, he took steps the next day to recover the rent for the entire year. So that the case presented by the plaintiff is that it was negligent in the defendant to leave the upstairs door of the house unlocked when he abandoned it on the 8th or 9th of December, 1901, thereby making it possible for any one to enter the house and set it on fire, and that for such negligence the defendant must respond in damages for the loss of the house by fire on the 30th or 31st of December, 1901.

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In considering the liability of the defendant under the circumstances mentioned, the question arises upon the threshold of that inquiry, was the act of the defendant in leaving the door of the house unlocked on the 9th of December the proximate cause of the fire which destroyed the house on the 30th of that month?

“The rule of law excluding a recovery for remote consequences has been attributed by some to the difficulty of unravelling a combination of causes, and of tracing each result, as a matter of fact, to its true, real, and efficient cause. It has also been said that the law considers only proximate causes for the reason that remote or speculative considerations would not afford a sufficient degree of certainty for judicial action. But in addition to this, considerations of fairness and justice require that no one should be held liable for the consequences of an act innocent in itself, and conceived without mischievous intent, which, by the concurrence of some event that could not by any possibility have been foreseen, has produced hurtful consequences to another.” *Watson on Damages*, section 35.

The same author says, that the injury must have been the proximate and natural consequences of such act; and that in this connection the term “proximate” excludes the notion of the intervention of any other culpable and efficient agency between the defendant’s dereliction and the loss. Section 33 of the same work is as follows: “A natural consequence is one which has followed from the original act complained of in the usual, ordinary, and experienced course of events. A result, therefore, which might reasonably have been anticipated or expected. Natural consequences, however, do not necessarily include all such as upon a calculation of chances would be found possible of occurrence or such as extreme prudence might anticipate, but only those which ensue from the original act without any

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such extraordinary coincidence or conjunction of circumstances as that the usual course of nature should seem to have been departed from."

These principles have been fully sustained and applied by this court. *Connell v. C. & O. Ry. Co.*, 93 Va. 57, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St. 786; *Fowlkes v. Southern Ry. Co.*, 96 Va. 742, 32 S. E. 464; *Watts v. So. Bell Telephone Co.*, 100 Va. 45, 40 S. E. 107; *Standard Oil Co. v. Wakefield*, 102 Va. 824, 47 S. E. 830, 66 L. R. A. 792.

In *Connell v. C. & O. Ry. Co.*, *supra*, it is said, quoting from an opinion of Justice Miller of the Supreme Court, that "to warrant the finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

And in the case of *Fowlkes v. Southern Ry. Co.*, *supra*, where the subject is quite fully considered, this court says: "It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate and not the remote cause of any event is regarded.

. . . In other words, the law always refers the injury to the proximate, not to the remote cause. . . . If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote.

. . . To the proximate cause we may usually trace the consequences with some degree of assurance; but beyond that we enter a field of conjecture, where the uncertainty renders the

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attempt at exact conclusions futile. . . . If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action."

The case at bar comes clearly within the influence of the principles to which we have adverted, and when they are applied to the facts here shown it would seem to be manifest that the alleged negligence and the damage complained of are not sufficiently conjoined to support the plaintiff's action. To the credit of the civilization in which we live it cannot be maintained that the natural and expected result of leaving the upstairs door of an empty house unlocked is, that some one who has no legal right there will enter the house and burn it, even though the house be located in a negro community.

The house was entered and burned by some one unknown to the plaintiff three weeks after it was vacated, a result which cannot be said to have followed the act of alleged negligence, in the usual, ordinary, and experienced course of events. On the contrary, such a result could not reasonably have been anticipated or expected.

This act was clearly the culpable and efficient intervening and proximate cause of the damage, and such damage cannot be said to be the legitimate sequence of the alleged negligence of the defendant. The injury complained of was the direct and immediate consequence of the act of the unknown party in setting fire to the house and the damage cannot, under the law, be traced to the remote negligence of leaving the door unfastened. Considerations of fairness and justice require that no one should be held liable for the consequence of an act innocent in itself,

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and committed without mischievous intent, which, by the concurrence of some event that could not reasonably have been anticipated, has produced hurtful consequences to another.

It is often difficult to determine what damages should be considered as flowing, in a natural and continuous sequence, from an act of negligence, and where there is doubt it is a question for the jury. In the case at bar, however, the question is so entirely free from doubt that the court can, as a matter of law, declare that the negligence alleged was not the proximate cause of the injury, reparation for which is here sought in damages. It is, therefore, unnecessary to consider the instructions and the questions discussed in connection therewith, for under no instructions would a recovery by the plaintiff be justified under the facts of this case.

For these reasons the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for further proceedings not in conflict with the views expressed in this opinion.

Reversed.

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Wytheville.

LANGSTON V. BASSETTE AND OTHERS.

June 15, 1905.

Absent, Cardwell, J.

1. *Process—Infants—Guardian ad litem.*—An infant can only appear and defend by a guardian *ad litem*, and proceedings against him are generally fatally defective unless the record shows that such a guardian was assigned him. If, however, it clearly appears that the decree rendered in a case to which such infant is a party is beneficial to him, the failure to appoint a guardian *ad litem* will not be reversible error.

Appeal from a decree of the Circuit Court of Elizabeth City county in a suit in chancery. Decree for defendants. Complainant appeals.

Reversed.

The opinion states the case.

Jones & Woodward and D. Lawrence Groner, for the appellant.

F. S. Collier & Son, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

This suit was instituted by the appellant for the purpose of impeaching the validity of a writing which had been admitted

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to probate as the last will and testament of Matilda Barnes, deceased. An issue of *devisavit vel non* was ordered. Upon the trial of that issue a jury was waived, and, all matters of law and fact having been submitted to the court for its decision, the court was of opinion that the said writing was the last will and testament of Matilda Barnes and so decreed. From that decree this appeal was granted.

It is alleged in the bill that James Barnes, one of the devisees and legatees named in the said writing, was an infant. He was made a party defendant and process was served upon him, but no guardian *ad litem* was appointed for him.

As an infant can only appear and defend by guardian *ad litem*, proceedings against him are generally fatally defective unless the record shows that a guardian *ad litem* was assigned him. *Code*, section 3255. See *Roberts v. Staunton*, 2 Munf. 129, 5 Am. Dec. 463; *Cole v. Pennell*, 2 Rand. 174; *Parker v. McCoy*, 10 Gratt. 594; *Ewing, &c. v. Ferguson*, 33 Gratt. 548; *Turner v. Barraud*, 102 Va. 324, 330, 331, 46 S. E. 318; *Note to Caperton v. Gregory*, 11 Gratt. (Michie's Ed.), at p. 251 *et seq.*, where a number of cases on the subject are collected.

It may be that the decree appealed from was for the benefit of the infant in this case since he was named as a devisee and legatee in the writing which was held to be the last will of the decedent. If this clearly appeared, the failure to appoint a guardian *ad litem* for him would not be reversible error. See *Harman v. Davis*, 30 Gratt. 461; *Morriss v. Va. Ins. Co.*, 85 Va. 588, 8 S. E. 383. But it does not so appear. In the writing which was held to be the will of the decedent, she describes the infant as her adopted son. The pleadings and proofs in the case show that she was a widow, and that she died without issue or any descendant of issue living. If the infant was in fact her adopted child, then it would be to his interest to

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have the writing in question held not to be her last will, as in that event he would take the whole estate instead of the small portion devised and bequeathed to him. Va. Code, 1904, section 2614.

We are of opinion, therefore, without passing upon any of the other questions raised on this appeal, that the decree appealed from should be reversed, and it and all orders in the cause affecting the rights of the said infant should be set aside and the cause remanded to the Circuit Court, that a guardian *ad litem* may be appointed for James Barnes (if he is still an infant) and such further proceedings had as may be necessary and proper for his full defense and for a final disposition of the cause.

Reversed.

Syllabus.

Mythville.**BRAMMER'S ADMINISTRATOR v. NORFOLK & WESTERN RAILWAY Co.**

June 15, 1905.

Absent, Cardwell, J.

1. **RAILROADS—Public Crossing—Personal Injury—Failure to Give Crossing Signal—Contributory Negligence—Case at Bar.**—One who takes no precautions for his own safety, but, without looking or listening for approaching trains, sits far back in a covered wagon and drives his team upon a railroad at a public crossing and is injured by a collision with a passing engine, is not entitled to recover damages of the railroad company for such injury, even though the engineer failed to sound the crossing signal. His own contributory negligence is the proximate cause of his injury, and this bars his recovery, unless after his danger was discovered, or by the exercise of ordinary care by those in charge of the engine might have been discovered, they failed to exercise ordinary care to avoid the collision.
2. **RAILROADS—Lookout—Fireman "hooking" fire.**—The fact that a fireman, in the regular discharge of his duties, is engaged in "hooking" his fire while the engine is in motion on one of its trips is not an act of negligence.
3. **RAILROADS—Public Crossing—Look and Listen—Contributory Negligence.**—It is the duty of one about to cross a railroad track at a public crossing to listen and look in both directions from which a train may approach. If he fails to do so and attempts to cross in front of a rapidly moving train and is injured there can, ordinarily, be no recovery. Trainmen have the right to assume that a traveller will take these necessary precautions, and until it is, or in the exercise of ordinary care ought to be, discovered that he is in a place of danger, and is not conscious of his peril, it is not negligence to fail to stop the train.

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Error to a judgment of the Circuit Court of Henry county in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Scott & Staples, J. B. Smith, N. H. Hairston and Samuel A. Anderson, for the plaintiff in error.

Henry G. Mullins, Dillard & Lee and Wm. Gordon Robertson, for the defendant in error.

KEITH, P., delivered the opinion of the court.

The accident by which plaintiff's intestate, M. L. Brammer, came to his death occurred upon the track of the Norfolk & Western railroad, at the crossing of a public road, a few miles west of Martinsville. Near the crossing is a small bluff, on the right-hand of a traveller approaching the railroad from Smith's river. For a short distance this bluff cuts off a view of the railroad from a person going in the direction of Martinsville, and an engine coming from Martinsville is not visible to a person standing on the crossing, until it comes out of a cut to the south, or east of south. As soon as it leaves the cut the engine is visible for the entire intervening distance. A man standing in the county road, or sitting in a vehicle in the road 23 feet from the crossing, can see 800 feet towards the cut; at 20 feet from the crossing he can see 900 feet in that direction. At the cut there is a sharp curve, and a person walking in the road towards the railroad track can see an engine coming out of the cut towards him, before he reaches the bluff. Approaching

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the railroad he comes in plain view of the track up to the mouth of the cut. The farthest point from the track at which a view of the cut (obstructed by the bluff) is fixed by the testimony at 23 feet. Between this point and the track the view of the cut is entirely unobstructed.

On the evening of the accident M. L. Brammer, a man in the possession of all of his faculties of sight and hearing, was approaching this crossing about six o'clock. There was nothing in the surroundings, save the bluff, to interrupt, or to interfere with the full exercise of his senses, either of sight or hearing. He was driving a two-horse covered wagon. The wagon sheet, according to the impression of one witness, was turned up a little on the sides. Whether it was turned up sufficiently to enable a person sitting in the wagon to see to the right or the left is not stated. When seen by the witness Brown, Brammer was sitting in the front of the wagon, but later at the crossing, at the time of the accident, he was not visible to other witnesses. According to one witness who saw the collision, and at the time was about fifteen feet above the crossing, as the wagon approached the railroad, no driver was visible. Her language is, "I saw a wagon coming, but did not see anybody driving. I saw it when it struck it." She could see into the front of the wagon, but could see no one at all, and did not see Brammer until he was knocked out by the collision. Another witness was in fifteen steps of the wagon when the accident happened. He saw no one driving it. He was coming along behind the wagon, and as a matter of course did not enjoy the same advantage of position for seeing the driver of the wagon as did one standing in front of it.

It was plain that the driver of the wagon was either sitting far back in his wagon, or was lying down. Wherever he may have been, he was not sitting on the front end of his wagon where he would be visible to observers and best able to take such notice

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of his surroundings as would enable him to take proper precautions for his own safety. Approaching the crossing, Brammer did not stop. The witness who was following the wagon says that when he heard the whistle of the engine blow, he thought "the wagon would stop right there for the train to pass, and he would overtake it, but he did not make any check at all, but kept straight on," and in a minute after the whistle blew the engine came out of the cut. The witness "still thought that the driver would see the engine and stop, but he did not make any stop at all—he just kept right on."

It is clearly shown by the evidence that if Brammer had been looking he could have seen the engine at a distance of 280 or 300 yards when he was within 20 or 25 feet of the track. There is positive evidence that the engineer blew the whistle for the crossing. There is much negative evidence that it was not blown. We will not undertake to determine this question, but will for the purpose of this case assume that it was not blown, and that in the failure to blow it the railroad company was guilty of negligence.

There is evidence to show that the engine, to which no cars were attached was running down grade by force of gravity, at a rapid rate of speed. There is no evidence, however, to show that its speed was such as to constitute negligence *per se*. The only negligence of which the railroad company may be said to have been guilty consists in its failure to sound the whistle, as we have assumed to be the case.

But this negligence was not the proximate cause of the injury, because it was none the less the duty of Brammer, upon approaching the railroad, to look and listen—to take precautions, in other words, for his own safety—and if he had done so, there is no doubt that he would both have heard and seen the engine in time to stop and thereby have avoided the accident. The

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real question upon which this case turns is, the plaintiff himself being negligent in his approach to the railroad, could the defendant by the exercise of ordinary care, after his danger was known, or ought to have been known, have avoided the consequences of that negligence?

After the evidence was all submitted to the jury, the defendant demurred, and the jury having found a verdict subject to the demurrer to the evidence, the Circuit Court entered judgment for the defendant. The case is therefore before us upon a well recognized rule of law, which has been stated so frequently that it is unnecessary now to do more than advert to it. Considered in obedience to that rule, we are of opinion that the judgment of the Circuit Court is plainly right.

It may be well to cite some authorities as bearing upon the reciprocal duties of the traveller and the railroad company at a public crossing.

In the case of *Johnson v. C. & O. Ry. Co.*, 91 Va. 171, 21 S. E. 238, it is said, that "if the death was caused solely by the negligence of the defendant, there can be no doubt of the right of the plaintiff to recover damages therefor. If, however, the proximate cause of death was his own negligence concurring with the negligence of the defendant, there can be no recovery." And further, that "by the use of his faculties, Johnson could have clearly seen the train as it approached the crossing, and the engineer could have seen him for the same distance after he came within 15 or 20 feet of the track, if they were at their posts and performing their duties." The negligence of the employees of the defendant was no excuse for negligence on the part of the plaintiff. The day was clear and still; his sight was unimpaired; he could hear the rumbling of the train. "There were reciprocal duties imposed upon him. He could not go on the railroad, even at a public crossing without exercising ordinary care and caution. The track was a proclamation of

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danger. It was his duty, before going on it, to use both eyes and ears. He should have listened and looked in either direction from which a train could come. If he had done so, he could not have failed to hear and see the approaching train, and be made sensible of the danger of going on the track. It was in plain view. If he failed to look and listen, as duty required of him, and attempted to cross the track in front of a rapidly moving train, and was caught before he could get across, and was killed, his own act, his own negligence so contributed to the injury that a recovery therefor cannot be sustained."

These remarks are applicable to the facts of the case under consideration, and are supported by a line of decisions. See *Lacy's case*, 94 Va. 475, 26 S. E. 834.

In *Martin v. R. F. & P. R. R. Co.*, 101 Va. 406, 44 S. E. 695, the rule is stated as follows: "A plaintiff seeking to recover damages for an injury caused by the negligence of the defendant, must himself be free from negligence, and if it appears that his negligence has contributed as an efficient cause to the injury of which he complains, the court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most at fault. The law recognizes no gradations of fault in such cases, and where both parties have been guilty of negligence, as a general rule, there can be no recovery. There is really no distinction between negligence in the plaintiff and negligence in the defendant, except that the negligence of the former is called contributory negligence."

It is true, however, that "a defendant company may be liable for injury inflicted on the plaintiff, notwithstanding the latter's contributory negligence, if by the exercise of reasonable care it could have discovered and avoided the injury." *Rogers' case*, 100 Va. 325, 41 S. E. 732; *Joyner's case*, 92 Va. 354, 23 S. E. 773.

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"If at a public crossing where a party is injured by a railroad train, the agents in charge of such moving train saw the party in a position of danger, or by the use of diligence might have seen him, and failed to exercise proper care and due diligence to stop the train and prevent it from striking him, it is liable." *Few's case*, 94 Va. 82, 26 S. E. 406.

This principle is well established and needs no further citation of authority.

Coming now to the facts as bearing upon this aspect of the case, it is true that while Brammer could see the engine the trainmen could likewise have seen Brammer. They saw the driver of a wagon approaching the track. The trainmen had a right to assume that Brammer would, in the discharge of his duty, take reasonable precautions for his own safety; that he would approach the railroad with his team under control (*Lacy's case, supra*), and that he would look and listen before undertaking to cross the track. It was only after it came to the knowledge of the trainmen, or by the exercise of ordinary diligence in the performance of duty upon their part should have come to their knowledge, that Brammer, disregarding his duty and oblivious of his danger, was in a position of danger, that the duty devolved upon the agents of the company to stop the train.

It appears that as the engine emerged from the cut the fireman was engaged in "hooking" his fire. This was in the regular line of his duty, and it cannot be considered an act of negligence. *L. & N. R. Co. v. Creighton* (Ky), 15 A. & E. R. R. Cas. 716, 50 S. W. 227. As soon as the fireman had performed the duty about which he was engaged, he looked up and saw the wagon approaching the crossing. He called to the engineer, who put on his emergency brake at once. The fireman saw no driver, and in this respect corroborates the testimony of other witnesses, who were near the scene of the accident, but saw no driver until he was thrown from the wagon by the force of the collision.

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When the fireman saw the horses, their feet were just about on the track, and they were in a fast walk. The engineman saw no one until the fireman called out, and his testimony is that he did all that he could to stop the engine; that his eye was on the track all the way from the cut; that there was a steep down grade to the crossing, and he could not see any one coming from the left on account of a curvature in the track; that the engine was running without steam and by gravity alone.

To sum up the case briefly, it appears that the railroad company was guilty of negligence in failing to sound its whistle, but that this omission was not the proximate cause of the accident, since the plaintiff in error's intestate, had he taken the precautions which the law imposed upon him, could have heard and seen the approaching train. In other words, the evidence establishes beyond doubt that Brammer was guilty of contributory negligence. Considering the case from that point, it then became incumbent upon the plaintiff in error to show that after the position of danger, in which the contributory negligence of Brammer had placed him, was known to the defendant in error, or in the exercise of reasonable diligence in the performance of its duties should have been known to it, it omitted to do something which might have saved him from the consequences of his own imprudence. The evidence wholly fails to prove any such omission.

In what we have said we have attempted little more than to abridge the very excellent opinion of the Circuit Judge, but we think we have said enough to show that there is no error in the judgment complained of, which is affirmed.

Affirmed.

Statement.

Wytheville.

CITY OF NEWPORT NEWS v. WOODWARD.

June 15, 1905.

1. CONSTITUTIONAL LAW—*Virginia Constitution (1902), Sec. 120, not Self-Executing—Suspension of Policeman.*—Section 120 of the Constitution (1902) conferring upon mayors of cities the power to suspend officers and members of the police and fire departments and to remove such officers, and also such members of said departments when authorized by the General Assembly is not self-executing, but required legislative action to render it operative.
2. CONSTITUTIONAL LAW—*Self-Executing Provisions.*—Whether or not a constitutional provision is self-executing is a question of intention in every case. If the nature and extent of the right conferred is fixed by the Constitution itself so that the same can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, the provision should be construed to be self-executing.
3. CONSTITUTIONAL PROVISIONS—*Construction—Former Constitutions.*—If a constitutional provision succeeds another on the same subject, and the former plainly required legislative action to become effective, while the latter is ambiguous on that subject, the courts will hold that the latter requires legislative action also.

Error to a judgment of the Corporation Court of the city of Newport News in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

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J. A. Massie, for the plaintiff in error.

Ashby & Read, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

On August 26, 1902, J. W. Woodward, defendant in error here, a police officer of the city of Newport News, was, upon charges preferred and after a hearing had, suspended from office for a period of thirty days; at the end of which term of suspension he was again assigned to duty and served for a few days, when he was again suspended upon other charges preferred, after a hearing, for another period of thirty days, which was afterwards reduced to fifteen days. On the 14th day of November, 1903, Woodward instituted this suit in the Corporation Court of the city of Newport News against the city, to recover ninety dollars, the amount of salary that he claimed was due him during the term of his suspension; and on April 18, 1904, a jury having been waived and all questions of law and fact submitted to the court, judgment was rendered against the city for the sum of \$60. It was the opinion of the court below that the Police Board of the city of Newport News did not have power to suspend policemen at the time the defendant in error was suspended, by reason of sections 117 and 120 of the present Constitution, which took effect July 10, 1902, which was prior to the date of this suspension.

These sections of the new Constitution, as far as they are pertinent to the issue in this case, are as follows:

Sec. 117. " . . . Cities and towns of the State having at the time of the adoption of this Constitution a municipal charter may retain the same, except in so far as it shall be repealed or amended by the General Assembly; provided, that every such charter is hereby amended so as to conform to all the provisions, restrictions, limitations, and powers set forth in this article, or otherwise provided in this Constitution."

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Sec. 120. " . . . The mayor shall see that the duties of the various city officers, members of the police and fire departments, whether elected or appointed in or for such city, are faithfully performed. He shall have power to investigate their acts, have access to all books and documents in their offices, and may examine them and their subordinates on oath. The evidence given by persons so examined shall not be used against them in any criminal proceeding. He shall also have power to suspend such officers and the members of the police and fire departments, and to remove such officers, and also such members of said departments when authorized by the General Assembly, for misconduct in office or neglect in duty, to be specified in the order of suspension or removal; but no such removal shall be made without reasonable notice to the officer complained of, and an opportunity afforded him to be heard in person, or by counsel, and to present testimony in his defense. From such order of suspension or removal, the city officer so suspended or removed shall have an appeal of right to the Corporation Court," etc.

Unless superseded by the provisions of the new Constitution above cited, the Police Board of the city of Newport News, by virtue of the charter of the city, section 62 (*Acts 1895-'6*, p. 86), had, at the time of the suspension of defendant in error, absolute control and authority over the police force of the city. See also *Johnson v. Barham, J.*, 99 Va. 305, 38 S. E. 136.

The sole question to be considered, therefore, is whether or not section 120 is self-executing, or required legislative action to render it operative. If self-executing, section 117 operated to repeal so much of the charter of the city of Newport News as is repugnant thereto.

The Legislature of Virginia enacted the following provision in relation to cities and towns (*Acts 1902-'3-'4*, p. 422):

Sec. 1033. *Mayors of cities; how chosen; their duties; appeals from their decisions; how removed for malfeasance, etc.*—In every city there shall be elected by the qualified voters thereof a mayor. . . . The mayor shall see that the duties of the various officers, members of the police and

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fire departments, whether elected or appointed, in and for such city, are faithfully performed. He shall have power to investigate their acts, have access to all books and documents in their offices, and may examine them and their subordinates on oath. The evidence given by the person so examined shall not be used against him in any criminal proceeding. He shall also have power to suspend such officers and the members of the police and fire departments, and to remove such officers for misconduct in office or neglect of duty, to be specified in the order of removal; but no such removal shall be made without reasonable notice to the officer complained of, and an opportunity afforded him to be heard in person or by counsel, and to present testimony in his defense. From such order of suspension or removal, the city officer so suspended or removed, or the member of the police and fire department so suspended, unless the charter of the city provides for an appeal to the board of police commissioners, or to the board of fire commissioners, shall have an appeal of right to the corporation court," etc.

It was unquestionably the purpose of the Convention in enacting section 120 of the Constitution to take from the police board of the several cities of the Commonwealth, or wherever the power and control was theretofore conferred, the control and supervision over the police force of the several cities and confer it upon the mayor; but was it intended to confer this power and control upon the mayor without reserving to the Legislature supervisory authority over the exercise of the power? It was, as is conceded, plainly not so intended as to the power of removal.

It is well recognized in treatises on constitutional limitations and the decided cases that if the nature and extent of the right conferred by a constitutional provision is fixed by the provision itself, so that the same can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing. The question is one of intention in every case, and if it is apparent that no subsequent legislation is necessary to carry such provision into effect, then such provision is self-executing.

Says Cooley in his work on Constitutional Limitations, p. 121: "A constitutional provision may be said to be self-

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executing if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law."

In *Ill. Cent. R. R. Co. v. Ihlenberg*, 75 Fed. 73, 34 L. R. A. 393, it was held, that whether or not a constitutional provision is self-executing is a question always of intention, to be determined by the language used and the surrounding circumstances.

The former Constitution, sec. 20, art. VI., provided that "he (the mayor) shall have power to suspend or remove such officers," etc., and in *Burch v. Hardwick*, 30 Gratt. 24, 32 Am. Rep. 640, it was held that policemen were State officers, that as such they were not contemplated in the words "such officers," but that this meant city officers, and as to the latter the mayor, by the Constitution, had exclusive power of removal. It was further held that the provisions of the charter of the city of Lynchburg, taking from the mayor the power to remove the chief of police, and vesting it in the Police Board, was null and void. Sec. 24, Art. VI., of the former Constitution appeared along with the other provisions provided for the government of cities and towns, and contained the provision that "the General Assembly, at its first session after the adoption of this Constitution, shall pass such laws as may be necessary to give effect to the provisions of this article."

It may be true, as counsel for defendant in error say, that the provisions of the new Constitution enlarging the powers of the mayors of the several cities and towns with reference to suspension and removal of members of the police force and fire department were intended to overcome the decision in *Burch v. Hardwick*, *supra*; but the question remains whether or not sec. 120, *supra*, was intended to operate *proprio vigore* as to the power of the suspension of the members of the police force and fire department and refer only the subject of the removal of such officers by the mayor to the Legislature for action?

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Discussing the light which the purpose to be accomplished may afford in the construction of a constitutional provision, in *Cooley's Con. Lim.* (6 Ed.), p. 80, the learned author says: "The prior state of the law will sometimes furnish the clue to the real meaning of the ambiguous provision, and it is especially important to look into it if the Constitution is the successor to another, and in the particular essential changes have apparently been made."

Here we have a constitutional provision which succeeds another, dealing with the same subject, and the former plainly referred the whole subject to the Legislature for action, while the latter is ambiguous in that respect. Under these circumstances we do not think it is a reasonable construction of the language employed that it was intended by the framers of the provision to refer to the Legislature for action the power intended to be conferred upon the mayor of a city or town to remove a member of the police force or fire department, while the suspension of these officers is left entirely in his power without legislative authority or control over his action.

We have no decision by this court helpful in determining the question under consideration. *Arey v. Lindsay*, 103 Va. 250, 48 S. E. 889; *Oppenheimer v. Myers*, 99 Va. 582, 39 S. E. 218, and *Burch v. Hardwick*, 30 Gratt., have no application whatever to this case. Our conclusion is that reading section 120 of the present Constitution in the light of the surrounding circumstances the language used clearly indicates that it was the purpose of its framers to refer the subject—the power and control over the police force in the several cities of the State—to the Legislature for action, and that said section is not to be construed as self-executing.

The judgment of the Corporation Court of Newport News must, therefore, be reversed and annulled, and this court will enter such judgment as that court should have entered.

Reversed.

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Mytheville.

CITY OF NEWPORT NEWS v. ROBINS.

June 15, 1905.

CARDWELL, J.:

This case is in all essential features the same as that of *City of Newport News v. Woodward*, just decided, and, for the reasons stated in the opinion of the court filed with the record in that case, the judgment of the Corporation Court of the city of Newport News in this will also be reversed.

Reversed.

Syllabus.

Wytheville.

DAVIS' ADMINISTRATRIX v. DAVIS AND OTHERS.

June 15, 1905.

Absent, Cardwell, J.

1. **LIMITATION OF ACTIONS—Suspension—Conditional Payments—Collaterals.**—Whether a note of a third person given for a pre-existing debt of the transferor is a discharge of the pre-existing debt, or a collateral security for it, or a conditional payment of it, is a question of intention of the parties. If given as a conditional payment it suspends all right of action on the original debt until the note so transferred has been dishonored by non-acceptance, or non-payment. The note taken in conditional payment becomes, by its dishonor, a collateral security, which the creditor may retain and endeavor to collect, without forfeiting the right to proceed on the principal cause of action, subject to the obligation of surrendering up the note at the trial.
2. **LIMITATION OF ACTIONS—Bonds—Code, Sec. 2938.**—Under the provisions of Sec. 2938 of the Code the limitation to an action on a bond dated and due prior to May 1, 1888, and upon which no action was then pending, is twenty years from its maturity, notwithstanding the death of the obligor in 1889.
3. **LACHES—Obscurity of Transaction.**—The defense of laches cannot prevail where the transaction has in no wise become obscure by the lapse of time or the loss of evidence and the sum sought to be recovered is susceptible of exact ascertainment.
4. **ESTOPPEL—Failure to Collect Debt—Change in Property Values.**—A creditor cannot be held responsible for a loss occasioned by a fluctuation in the values of his debtor's property such as a failure to enforce the collection of his debt during "the boom period." The consequences of the failure of the debtor to pay his debt cannot be visited on the creditor.
5. **ESTOPPEL—Inconsistent Positions in Litigation—Case in Judgment.**—The facts contained in the record of this cause do not sustain the contention that appellees have assumed inconsistent positions in this litigation. The lack of proper parties to one of the suits prevented them from asserting

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their claim against the person, and in the time and manner it is claimed it should have been done; and the mode of procedure adopted by them has not injuriously affected or prejudiced the rights of appellants.

Appeal from a decree of the Chancery Court of the city of Richmond in three chancery causes heard together. In one of these the appellees, Henry G. Davis and Thomas B. Davis, were the complainants. The decree was in their favor. This appeal was taken by the personal representatives of John B. Davis and Joseph B. Davis, whose estates were affected, and by two of the creditors of Joseph B. Davis.

Affirmed.

The opinion states the case.

Jo. Lane Stern and Henry R. Pollard, for the appellants.

Smith, Moncure & Gordon, for the appellees.

WHITTLE, J., delivered the opinion of the court.

The decree appealed from was passed by the Chancery Court of the city of Richmond in three suits in equity pending in that court and heard together. These causes are creditors' suits—the first two against the estate of Joseph B. Davis, deceased, who was a son and devisee under the will of John B. Davis, and the last against the estate of John B. Davis, deceased.

The appellees, Henry G. Davis and Thomas B. Davis, are creditors of both estates; and as creditors of the son's estate presented and had audited their debts against it in the two first named causes. In these two suits the real estate of Joseph B. Davis, other than that derived from his father, was sold and the proceeds administered. But the court at that time refrained from selling the residue, because the life estate of the widow of John B. Davis intervened. Subsequently, the life estate having fallen in, the undivided one-third interest of Joseph B. Davis in his father's lands was decreed to be sold, the decree

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reciting: "It . . . appearing to the court that the said sale may now be made with propriety, since the death of Elizabeth B. Davis, the life tenant of said property under the will of John B. Davis, deceased." Accordingly, the owners of the remaining undivided two-thirds interest having united in the sale with the special commissioners, the whole of the real estate of which John B. Davis died seized was sold. Thomas B. Davis, one of the appellees, became the purchaser of seventy-three acres at the price of \$2,920.

This was the status of affairs in 1901, when appellees, as creditors of the estate of John B. Davis, deceased, instituted suit against his personal representative and devisees to subject his property to the payment of their debt. To that suit the defendants interposed the defenses of the statute of limitations, laches, and estoppel.

A statement of the facts in connection with the origin of appellees' debt is essential to an intelligent apprehension of these several defenses. Appellees and John B. Davis were brothers. The two former are residents of the State of West Virginia, while the latter resided in Richmond, Virginia. John B. Davis became financially embarrassed, and on September 22, 1882, appellees loaned him the sum of \$70,000, for which he executed his bond, payable on demand. On March 1, 1888, John B. Davis and his two brothers met at Piedmont, West Virginia, when it was agreed that John B. Davis should deliver to appellees certain notes held by him against third parties, together with a life insurance policy and a check, aggregating \$35,000, upon the stipulation that the securities "when and if paid shall be in full settlement of the said note for \$70,000." The agreement was signed in duplicate, and a schedule of the notes, and notes corresponding to the schedule, were delivered to appellees. The notes matured from time to time during the period from March 21, 1888, until October 15, 1896. The bulk of these assets was collected, and the residue, the precise amount of which has not been ascertained, constitutes the subject matter of this litigation.

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John B. Davis died in January, 1889, leaving his estate to his widow for life, with remainder in equal shares to his two surviving children and a grandchild. The personal assets were duly administered, and the proceeds of sale of the real estate have been deposited in bank to await the result of this appeal.

The contention that the demand is barred by the statute of limitations is founded upon a proviso to section 2920 of the Code of 1887, which went into effect May 1, 1888, and is as follows: "Provided, that the right of action against the estate of any person hereafter dying, on any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not, in any case, continue longer than five years from the qualification of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued."

In this instance while, as shall be seen presently, the right of action did not accrue until after the death of John B. Davis, still as suit was brought within five years after such right did accrue, the debt would not have been barred even if the proviso applied to the case.

In *Daniel on Negotiable Instruments* it is said: "When a bill or note is taken for or on account of a debt, the question arises whether it was taken in absolute discharge of it and operates as a complete merger, or simply as a collateral security, or in suspension of the debt, during its currency. The intention of the parties is the controlling element. And if there be any distinct agreement on the subject, all controversy is silenced. But when no particular intention is manifested, and no express or implied agreement appears, the question is to be solved by principles of law which make presumptions as to the intention of the parties according to the circumstances of each particular case." 2 *Daniel on Neg. Instr.* (5 Ed.), sec. 1259.

At section 1272 the learned author observes: "There is no

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doubt that a negotiable bill or note given for or on account of a contemporaneous or pre-existing debt, and whether or not it be in renewal of a previous bill or note, suspends all right of action on such debt during its currency—that is, until it is dishonored by non-acceptance or non-payment. If this were not so, the creditor who took the additional security, in the form of a bill or note, might, in consequence of its negotiable character, transfer it to a *bona fide* holder, and subject the debtor to payment of both the original and the new debt.

“But as soon as the bill or note is dishonored, the original debt revives, and the creditor may pursue his remedy for it, or sue upon the bill or note. The bill or note taken in conditional payment becomes, by its dishonor, a collateral security, which the creditor may retain and endeavor to collect, without forfeiting the right to proceed in the principal cause of action, subject to the obligation of surrendering up the bill or note at the trial.” See also *Armistead v. Ward*, 2 Pat. & H. 504; *McCluny v. Jackson*, 6 Gratt. 96; *Blair & Hoge v. Wilson*, 28 Gratt. 165; *Lewis v. Davisson*, 29 Gratt. 216, at 226; *Callaway v. Price*, 32 Gratt. 1.

The doctrine with respect to the delivery of bills or notes as conditional payments is not to be confounded with the mere deposit of collateral securities to secure payment of the principal debt. In the latter case, in the absence of agreement to the contrary, the pledgee's right of action on the principal debt and the right to enforce payment of the collateral security are concurrent rights, both of which may be pursued until the debt is paid. *Colebrooke on Collateral Securities* (2nd Ed.), ss. 104, 105, 106, and notes; 2 *Daniel on Neg. Instr.*, s. 1260, n. 4, and authorities cited.

In this case it was obviously the intention of the parties that the promissory notes in question should be treated as conditional payments, and suspend, during their currency, the right of action on the original debt. That was the legal effect of the contract, and a different construction would have defeated

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its purpose. This being the effect of the agreement, the cause of action had not accrued (was suspended) at the time of John B. Davis' death.

But we are of opinion that inasmuch as suit was not pending on the day before the Code took effect, the case is controlled by section 2938 of the Code, which provides that where the action was not pending on the day before the Code took effect, it "may be prosecuted within such time as the same might have been prosecuted if this chapter had not been enacted, and not after."

The period of limitation was twenty years on a writing under seal prior to the Code of 1887; the original bond is dated September 22, 1882, and the right of action thereon was not barred until September 22, 1902, more than a year after the institution of this suit. So that in neither aspect of the case can the plea of the statute of limitations avail.

The remaining defenses of laches and estoppel are not sustained by any fact or circumstance in the case. That appellees were not dealing at "arm's length" with their brother, and after his death with his widow, is manifested on every page of the record. When overtaken by financial reverses, they came to his relief and loaned him \$70,000 without security, and afterward forgave him one-half the debt, receiving promissory notes and other securities in conditional satisfaction of their demand. These securities were collected from time to time until the indebtedness of \$35,000 was reduced to the amount now in controversy. It is not pretended that the debt has been paid from any other source; and the fact that uncollected and uncollectable collaterals, representing the balance claimed, are still in the hands of appellees shows that it has never been paid. John B. Davis died within less than a year after the agreement of March, 1888, was entered into, and, as remarked, by his will left the whole of his estate to his wife for life. She was a nervous, delicate woman, and it is reasonable to presume that the same considerations which influenced appellees to assist and indulge

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their brother also induced them to allow his widow to remain in the undisturbed possession of the property during the continuance of her life estate.

In thus indulging her they kept within their legal rights, and instituted this suit in less than two years after her death. In the meantime the transaction had in no wise become obscure by lapse of time or loss of evidence, and the sum sought to be recovered is susceptible of exact ascertainment. That under such circumstances the defense of laches cannot prevail, has been settled by repeated decisions of this court. *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861, 64 Am. St. 726; *Bell v. Wood*, 94 Va. 677, 27 S. E. 504; *Burnham v. James*, 100 Va. 493, 42 S. E. 292; *Tidball v. Bank*, 100 Va. 741, 42 S. E. 867.

The defense of estoppel is equally without merit. The chief ground of complaint in that connection is based on the theory that loss has accrued to appellants by reason of the failure of appellees to enforce the collection of their debt during the years 1890 and 1891 (the boom period), when, it is said, the proceeds of sale of a few acres of the debtor's land would have satisfied the demand.

As has been seen, appellees' right of action was suspended during those years by the agreement of March, 1886; but if such had not been the case, the proposition proceeds upon the false premise that a creditor can be held responsible for loss occasioned by fluctuation in property values. Payment of the debt affords the debtor adequate protection against loss from such contingency, and the consequences of his failure to look after his own interests cannot be visited upon his creditor.

The remaining suggestion, that appellees have assumed inconsistent positions in the litigation, which ought to estop them from setting up the present demand, is not sustained by the record.

The alleged inconsistency is founded upon the circumstance that appellees did not assert their debt against the estate of John B. Davis, deceased, in the two first named causes, and

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suffered a decree to be rendered therein, subjecting the interest of Joseph B. Davis, deceased, in the lands derived from the estate of his father to be sold; and that Thomas B. Davis, one of the appellees, became the purchaser of one of the lots.

Appellees had no notice of the decree directing a commissioner to inquire and ascertain whether there was any liability on the estate of Joseph B. Davis, deceased, on account of assets acquired by him under the will of his father, nor of the report returned in pursuance of that decree. And even if they had received such notice, they could not have asserted their debt against the estate of John B. Davis, deceased, for the reason that his personal representative was not a party to the litigation. They, therefore, pursued the correct practice of filing a creditors' bill against his estate; and when the suit was matured, for obvious reasons, it was brought on to be heard with the other two causes.

It is not perceived that the course thus pursued by appellees has injuriously affected or prejudiced in any manner the rights of the appellants.

The following extract from the answer of the personal representative of John B. Davis sufficiently attests the meritoriousness of appellees' demand:

"In making the foregoing defenses to the complainants' claim, respondent has done so only because she has been advised that it was her imperative duty as administratrix. For whatever may be the legal merits or demerits of complainants' claim, respondent feels bound to put on record her acknowledgment of the great kindness of complainants to her late father in the transactions out of which said claim arose, and the high character, from a moral standpoint at least, of the claim itself."

The decree of the Chancery Court is without error and must be affirmed.

Affirmed.

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ROBERTSON v. CITY OF STAUNTON.

June 15, 1905.

1. CONSTITUTIONAL LAW—*Municipal Indebtedness—Limit Prescribed by Constitution, Sec. 127—Code, Sec. 1039.*—The limitations of section 127 of the Constitution (1902) apply to the charters of all cities and towns which do not in terms authorize a percentage of indebtedness larger than eighteen *per cent.* of the assessed valuation of real estate in such city or town. The act of March 20, 1875, carried into the Code of 1887 as Sec. 1039 limiting the right of a city or town to create an indebtedness beyond seventeen *per cent.* of its real and fifteen *per cent.* of its personal property, was not a grant of power to cities and towns to create indebtedness to that amount, but was a limitation on their powers where none previously existed, and hence section 127 of the Constitution applies to such cities and towns and limits their right to issue bonds or other interest bearing obligations to an amount not exceeding eighteen *per cent.* of the assessed valuation of their real estate. Upon the adoption of the Constitution this act perished by reason of its repugnancy.
2. CONSTITUTIONAL LAW—*Self-executing Provisions—Constitution of Va., Sec. 127.*—Constitutional provisions of a negative character are generally, if not universally, construed to be self-executing. They are also self-executing if they supply sufficient rules by means of which the right given may be enjoyed and protected, or the duty imposed be enforced. As the Legislature could not authorize a city or town to contract indebtedness beyond the limit prescribed by sec. 127 of the Constitution, no legislation is needed to put that section of the Constitution into operation, and it operates *proprio vigore*.

Appeal from a decree of the Corporation Court of the city of Staunton in a suit in chancery. Decree for defendant. Complainant appeals.

Reversed.

The opinion states the case.

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S. D. Timberlake, Jr., for appellant.

Braxton & McCoy, for the appellees.

KEITH, P., delivered the opinion of the court.

This cause originated in a bill filed by the appellant, Alexander F. Robertson, in the Corporation Court of the city of Staunton, praying an injunction against the issue by the city of five bonds of the denomination of one hundred dollars each, which were to be sold and the proceeds applied to improving the streets and alleys of that city.

At the time of the adoption of the ordinance providing for the issue of these bonds, the outstanding interest-bearing bonds of the city of Staunton aggregated, in round numbers, \$578,000, or nearly twenty-one per cent. of the assessed value of all the real estate within the city subject to taxation. The injunction was prayed for upon the ground that the issue of the bonds would be illegal, and in contravention of the limitation imposed upon municipalities in respect to the creation of indebtedness by section 127 of the Constitution of the State.

A temporary injunction was awarded, and the city filed its answer to the bill. It admitted that its bonded indebtedness was already largely in excess of eighteen *per centum* of the assessed value of the real estate within the city subject to taxation, but claimed that it came within the proviso of section 127 of the Constitution, because its charter authorized the city to contract debts and issue bonds without limit, and that it was, therefore, authorized by its charter, within the meaning of section 127 of the Constitution, to issue bonds without any limitation or restriction. So much of the charter of the city of Staunton as is pertinent to this inquiry, is as follows:

"The city council may, in the name of and for the use of the city, contract loans, or cause to be issued certificates of debts, or bonds; but such loans, certificates, or bonds, shall not be irredeemable for a period greater

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than thirty-four years; provided, however, that said council shall not contract such loans, or issue such certificates of debt, or bonds, for the purpose of subscribing to the stock of any company incorporated for a work of internal improvement, or other purposes, without being first authorized so to do by three-fourths of the legal voters of the city voting on the question; and the council shall, when such debt or loan is created, provide a sinking fund for the payment of the same; and provided further, that the said council shall not endorse the bonds of any company whatsoever without the same authority."

On March 20, 1875, the Legislature passed an act as follows:

"It shall not be lawful for any city or town to create, at any time, an indebtedness in excess of seventeen *per cent.* of the assessed value, under the State assessment laws, of its real, and fifteen *per cent.* of its personal property: Provided, that this section shall not apply to any city or town whose charter already determines the limit of aggregate indebtedness allowed to be created by it, except the town of Danville." Acts 1874-'5 p.

This act was carried into the Code of 1887 as section 1039.

Section 127 of the Constitution is as follows:

"No city or town shall issue any bonds or other interest-bearing obligations for any purpose, or in any manner, to an amount which, including existing indebtedness, shall at any time exceed eighteen *per centum* of the assessed valuation of the real estate in the city or town subject to taxation, as shown by the last preceding assessment for taxes; provided, however, that nothing above contained in this section shall apply to those cities and towns whose charters, existing at the adoption of this Constitution, authorize a larger percentage of indebtedness than is authorized by this section."

Appellant contends that section 1039 of the Code was repealed by the Constitution. It was certainly repealed by the Legislature. Acts 1902-'3-'4, pp. 412, 691. It applied while in force to the city of Staunton. It did not confer the power to create indebtedness, but operated as a limitation upon the power conferred by the charter. As it was lawful, by its terms, at any time, for a city or town to create an indebtedness not in excess of seventeen *per cent.* of the assessed value of its real, and fifteen *per cent.* of its personal property, it was plainly in conflict with section 127 of the Constitution, which imposed a limit

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upon the issue of bonds by a city or town, for any purpose, in excess of eighteen *per cent.* of the assessed value of the real estate in the city or town subject to taxation. Upon the adoption of the Constitution, therefore, the act perished on account of its repugnancy.

It is important to observe that section 1039 was not, and was never intended to be, a source of power to issue bonds to the extent of seventeen *per cent.* upon realty and fifteen *per cent.* upon personalty subject to taxation, but merely imposed a limit upon all cities and towns to which it applied—that is to say, to all cities and towns of the Commonwealth except those whose charters fix the “limit of aggregate indebtedness allowed to be created by it except the town of Danville.” If section 1039 could be treated, as the source of power, as authorizing cities and towns to issue bonds up to the limit which it imposes, and as entering into the charters of cities and towns existing at the time of the adoption of the Constitution, then section 127 of the Constitution would be practically inoperative. It limits the issue of bonds to eighteen *per cent.* of the assessed value of real estate, while section 1039, if to be regarded as a source of power, limits the city or town to seventeen *per cent.* upon realty and fifteen *per cent.* upon personalty, so that the aggregate indebtedness authorized by the act would necessarily exceed eighteen *per cent.* of the assessed valuation of real estate in all towns in which the value of personalty constituted more than one-eighteenth of the value of the realty, a construction which would render section 127 practically nugatory.

We think that by a proper construction of section 127 of the Constitution it is to be taken as dealing with the several legislative charters of cities and towns of the State, and that the general laws, by which cities and towns are regulated, perished with the adoption of the Constitution, if repugnant to it, or were left by that instrument to be dealt with by the Legislature in the ordinary course of legislation; and that the limitations of section 127 apply to the charters of all cities and towns which

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do not in terms authorize a percentage of indebtedness larger than that named in the section—that is to say, eighteen *per cent.* of the assessed valuation of real estate in the city or town subject to taxation.

It is proper for us to consider whether or not the section of the Constitution to which we have referred is self-executing or requires legislative action to render it operative.

Provisions of a Constitution of a negative character are generally, if not universally, construed to be self-executing. The fifteenth amendment of the Constitution of the United States illustrates this rule. It provides that the right of citizens of the United States to vote shall not be denied or abridged on account of race, color, or previous condition of servitude. "To this extent," says Mr. Cooley (Cooley on Constitutional Lim. (7 Ed.), p. 120), "it is self-executing, and of its own force it abolishes all distinctions in suffrage based on the particulars enumerated. But when it further provides that 'Congress shall have the power to enforce this article by appropriate legislation,' it indicates the possibility that the rule may not be found sufficiently comprehensive or particular to protect fully this right to equal suffrage, and that legislation may be found necessary for that purpose. Other provisions are completely self-executing, and manifestly contemplate no legislation whatever to give them full force and operation."

And generally, says Cooley (p. 121): "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law."

If we have rightly construed section 127, there can be no doubt that it operates *proprio vigore*. As was said by the Supreme Court of the United States in *Doon v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 220, 35 L. Ed. 1044, "No legislation can

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confer upon a municipal corporation authority to contract indebtedness which the Constitution expressly declares it shall not be allowed to incur."

So far, therefore, from this provision requiring legislative authority to make it operative, it would of its own inherent force have rendered of no avail a statute which undertook to authorize what it has prohibited.

We are of opinion that there is error in the decree of the Corporation Court, for which it must be reversed.

Reversed.

Syllabus.

Wytheville.**TRIGG COMPANY AND OTHERS v. BUCYRUS COMPANY AND
OTHERS.**

June 15, 1905.

Absent, Cardwell, J.

1. **SALES—Future Delivery—When Title Passes.**—When a contract is made for the purchase of an article hereafter to be delivered and paid for, as long as any act remains to be done by the vendor in order to put it in a state of readiness for delivery, the property does not pass to the buyer, but still remains at the risk of the seller.
2. **SALES—Articles to be Made—Case at Bar—Bailment.**—Under the contract in suit the seller agreed to make, deliver, and install machinery for a ship, for which the purchaser was to pay one-third cash upon delivery, one-third when the machinery was installed, and the residue when tested and received by the engineer of the government for whom the completed whole was intended. The purchaser agreed, upon request, to afford the facilities of its yards for the installation, to insure for the benefit of the seller as his interests might appear, and to indemnify him against loss or damage occasioned by certain specified causes, without his fault. The purchaser also agreed to make the payments above specified. The machinery was made and delivered according to contract, and the cash payment was made. The property of the buyer was then placed in the hands of a receiver in insolvency proceedings.

Held: This was a sale on time as to a part of the purchase price, and not a bailment, and, the machinery having been not only completed but actually delivered and paid for to the full extent demanded by the contract, title passed to the buyer.

3. **CONTRACTS—Construction—Practical Construction by Parties—Case at Bar.**—If the terms of a contract are ambiguous and its proper construction doubtful, the courts will adopt the practical construction, if any, placed upon it by the parties thereto. In the case at bar the practical construction placed on the contract in controversy was that of a sale and not a bailment; the seller having sworn to and had recorded a supply

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lien claiming that the machinery mentioned in the contract constituted supplies furnished to the seller under said contract, and the buyer having listed it as a part of his property.

4. **REGISTRY**—*Contracts With Government—Reservation of Title—Conditional Sales.*—Contracts between the government of the United States and contractors by which it is stipulated that all parts of machinery paid for by the government under a specified system of partial payments shall become thereby the sole property of the United States do not come within the category of contracts which are required to be recorded by section 2462 of the Va. Code, 1904. No title is reserved in such contracts, and there is no element of a conditional sale about the transaction.
5. **INTEREST**—*Claims Against U. S. Government.*—In no case is interest allowed on claims against the government of the United States, unless the government has stipulated to pay interest, or it is given by express statutory provision.

Appeal from a decree of the Chancery Court of the city of Richmond in a suit in chancery instituted by creditors of the William R. Trigg Company, suing on behalf of themselves and all other creditors similarly situated, against the William R. Trigg Company and others. Into this suit the Bucyrus Company came by petition asserting a claim of title to certain property in the hands of the receiver and about to be turned over to the United States Government. Decree in favor of Bucyrus Company, The William R. Trigg Co., and a number of its creditors appealed.

Reversed.

The opinion states the case.

J. J. Leake, Bickford & Stuart, Whitehurst & Hughes, A. W. Patterson, George Bryan and T. C. Gordon, for appellants.

Munford, Hunton, Williams & Anderson, Christian & Christian, Francis L. Smith, Coke & Pickrell and L. L. Lewis, for the appellees.

HARRISON, J., delivered the opinion of the court.

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The bill in this case was filed by certain supply lien creditors of the William R. Trigg Company, shipbuilders, suing on behalf of themselves and all other creditors similarly situated, alleging the insolvency of the defendant company and asking the appointment of a receiver to take charge of its assets and administer the same under the orders of the court. Thereupon numerous other supply liens were filed, among them one for \$20,744.08 by the Bucyrus Company, of Milwaukee, Wisconsin.

At the time the bill was filed and the receiver appointed, the Trigg Company was engaged in the construction of a number of vessels for the United States, among them a certain sea-going suction dredge at a cost of \$252,375.00. To be used in the construction of this vessel, the Bucyrus Company furnished the Trigg Company, under a contract in writing between the parties, certain pumping machinery, at a cost of \$32,050.00. It is the rights of the parties growing out of this contract that are the subject of the present controversy between the receiver and the supply lien creditors of the Trigg Company, on the one hand, and the Bucyrus Company on the other, the latter claiming title to the pumping machinery in question, and therefore to the whole of its proceeds, which claim is vigorously controverted by the receiver and creditors of the Trigg Company.

In pursuance of the acts of Congress, in such cases made and provided, the United States Government filed its stipulation herein, claiming the unfinished vessel and all machinery on hand applicable to its construction, agreeing to protect the creditors of the Trigg Company in any claim they might have in or to the property which was superior to the rights of the government. Thereupon an order was entered, directing the receiver to surrender possession of the unfinished dredge and certain materials applicable thereto, including the pumping machinery in controversy, to the United States, or their authorized agents. Subsequently a balance of \$14,266.67 was ascertained to be due from the United States on this pumping

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machinery, and it is this sum, in the hands of the government, which is now the real subject of controversy, the decree appealed from having directed its payment to the Bucyrus Company.

The contract, which is dated September 16, 1901, provides that the Bucyrus Company shall construct and deliver the pumping machinery to the Trigg Company at Richmond, Virginia. It further provides that the Bucyrus Company shall at its own expense install the machinery in the hull of the dredge; the Trigg Company, if requested, to afford the facilities of its yards for such installation, and, if requested, to furnish men and material for that purpose at cost. The Trigg Company agreed to pay for furnishing and installing the machinery \$32,050.00—one-third thereof when the pumping machinery was delivered at the works of the Trigg Company at Richmond, Virginia; one-third when such machinery was installed on board the dredge; and the balance on the completion of the government test, and after the machinery was found to be satisfactory to the government engineer. The Trigg Company agreed, at the delivery of the machinery and until it was accepted and paid for, to keep the same insured against fire and marine risk for the benefit of the Bucyrus Company as its interest might appear, and for the benefit of the United States as their interest should appear. It was further mutually understood that if, for any reason other than the fault of the Bucyrus Company, the dredge should not be ready to receive the machinery within ten months from the date of the contract, or if for any reason, other than the fault of the Bucyrus Company, it should not be installed as contemplated, or if, for any reason other than the fault of the Bucyrus Company, the completed dredge should not be delivered to or accepted by the government, the Trigg Company should save and hold harmless the Bucyrus Company from all loss and damage resulting therefrom. Section 65 of the specifications, which are made a part of the contract, provides that all parts paid for under the system of partial payments specified shall become thereby the sole prop-

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erty of the United States, but that this provision shall not be interpreted as relieving the contractor (Trigg Co.) from the sole responsibility for the proper care and protection of said parts prior to the delivery of the dredge to the United States, or from any other of the provisions of the specifications; and that the contractor shall, at its own expense, properly store and care for the pumping machinery during the period, if any, between delivery and installation. The provisions of the contract to which we have adverted are alone relied on as throwing any light upon the present controversy.

In accordance with the obligations assumed by it, the Bucyrus Company manufactured and constructed the machinery in question, and prior to the appointment of the receiver shipped the completed article, consigned to the Trigg Company, and delivered it into the possession of that company at its yards in Richmond. Thereupon the Trigg Company promptly paid the vendor \$10,683.33, one-third of the purchase price, as provided for by the contract.

In his brief, the learned counsel for the vendor concedes that, if the Bucyrus Company delivered this property to the Trigg Company as purchaser, the title and possession both passed with it. It is, however, contended that it was not delivered to the Trigg Company as purchaser, but as a mere bailee, and that therefore the title and possession both remained with the Bucyrus Company; the general rule relied on as controlling this case being that, when a contract is made for the purchase of an article hereafter to be delivered and paid for, so long as any act remains to be done by the vendor in order to put it in a state of readiness for delivery, the property does not pass to the buyer, but still remains at the risk of the seller. Citing *Dixon v. Myers*, 7 Gratt. 240; *Chapman v. Campbell*, 13 Gratt. 105; *Haxall v. Willis*, 15 Gratt. 434.

As bearing upon the same general subject, *Old Dominion S. S. Co. v. Burkhardt*, 31 Gratt. 664, may be very properly added to this list of cases. See also *In re Leeds*, 129 Fed. 922; *In re Martin Vernon Music Co.*, 132 Fed. 938.

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The contention is that the delivery of the machinery to the Trigg Company was only for the purpose of enabling the vendor to carry out that provision of the contract which required it to install the machinery in the hull of the dredge; that for the purpose of being installed the vendee had to return or redeliver the machinery to the vendor; and that this remaining obligation to install the machinery brings the case within the rule mentioned. The provisions of the contract particularly relied on as tending to show that the title to and possession of this property never passed out of the Bucyrus Company, are, that the Trigg Company agreed to furnish the facilities of its yards for installing the machinery, and undertook to keep the same insured for the benefit of the Bucyrus Company as its interest might appear; and that the machinery was not to be paid for in full until the dredge was completed and accepted by the government.

We cannot concur in the construction of the contract insisted upon by the vendor. After full consideration of the agreement, the terms of which were reduced to writing by the parties in a carefully prepared paper, we have been unable to discover any element of a bailment in the transaction under consideration.

Story, in his work on Bailments, section 2, says: "A bailment is the delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust."

It would be difficult to bring the transaction before us within the terms of this definition. The transaction under consideration plainly involved the absolute sale of a chattel to be manufactured and delivered by the Bucyrus Company to the Trigg Company, at an agreed price; and when the article was completed and delivered, according to contract, the title thereto vested in the vendee, and the right to the purchase price vested in the vendor. The contract contains no reservation of title on its face, nor is there anything in its terms to indicate that

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the title and possession were intended to be and remain in the vendor after the delivery of the completed machinery to the vendee at Richmond. The machinery was the thing bought and sold, under the contract, and when that was finished and delivered to the vendee and paid for to the extent required by the contract, nothing remained to be done to complete the sale and purchase of the article bargained for, or to vest the vendee with a more absolute title and possession than was then acquired. The vesting of the title in the vendee was not affected by the additional contract of the vendor, at some future time to install the machinery in the hull of the dredge, or by the agreement of the vendee to allow the vendor the facilities of its yards for that purpose. This seems quite clear from the contract, for by its sixth clause the obligation is imposed upon the vendee to save the vendor harmless from all loss or damage, whether the machinery is installed or not, provided the vendor is not responsible for the failure to install. This provision is certainly not in harmony with the idea that the vendee had no interest in the property until it was installed, and was merely holding it as trustee for the vendor.

Nor is the provision of the contract, that the vendee should keep the machinery insured for the benefit of the vendor, as its interest might appear, significant as showing that the title was not to vest in the vendee. This provision only showed that the vendor had an insurable interest in the property, but that circumstance in no way affected the title of the vendee. It is a very common business transaction, where the whole of the purchase money is not paid, to require the vendee to keep the property insured for the benefit of the vendor as his interest may appear.

One-third of the purchase price was paid by the vendee in cash, upon the delivery of the machinery, and the provision that the purchase money was not to be paid in full until the dredge was completed and accepted by the government could have no bearing upon the title of the vendee. To the extent that the

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payment of the purchase money was postponed by the contract, it was a sale on time, and by the clause of the contract already adverted to, the vendor was protected against unreasonable delay in its payment by the obligation of the vendee to save it harmless although the dredge should never be completed.

Our view is, therefore, that the case at bar does not come within the influence of the rule invoked, for the article purchased was not only completed, with nothing remaining to be done to put it in a state of readiness for delivery, but it was actually delivered and paid for to the full extent demanded by the contract.

If the terms of the contract were ambiguous and its proper construction doubtful, it could be subjected to another test which is always entitled to great weight under such circumstances, and that is the construction which the parties have, by their acts, placed upon it. *King v. N. & W. R. R. Co.*, 99 Va. 625, 39 S. E. 701; *Glenn v. Perpetual B. & L. Co.*, 99 Va. 695, 40 S. E. 25. The result of this test shows that the view we have taken of the contract is fully sustained by the construction which the parties by their acts have placed upon it.

The vice-president and receiver of the insolvent vendee, who had been active in the management of its affairs and was well acquainted with its assets, when directed by the order of December, 1902, to take possession of all the property, real and personal, in the possession of the Trigg Company, or to which it was entitled, and to make an inventory of all such assets, took possession of the machinery in question and inventoried it as the property of the Trigg Company. No suggestion was made by him that the machinery was only a bailment and should be, therefore, turned over to the Bucyrus Company, from whom it came. Nor did the vendor then make any such claim. On the contrary, two weeks after the appointment of the receiver, it had recorded in the Chancery Court of the city of Richmond a supply lien, claiming that the machinery in question constituted supplies furnished by it to the Trigg Com-

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pany, under the contract of September 16, 1901; that there was a balance of \$20,744.08 still due and owing by its vendee on account of such supplies, and as security therefor claiming the lien provided by statute against all of the assets of the vendee. The truth of the facts set forth in this claim of lien was sworn to by the manager of the Bucyrus Company, who was one of its general officers. This act of the vendor is conclusive of its construction of the contract at the time and cannot be reconciled with its present pretension, made six months afterwards, that it had not parted with the title to or possession of the machinery, but that it was held by the Trigg Company as a mere bailee.

We have given careful consideration to the decisions of this court relied on to sustain the contention of the vendor. They discuss the general principles of law bearing upon this class of cases, though in each the facts are wholly different. So far as the principles there announced are applicable, they are certainly not opposed to the conclusion reached in this case, that the transaction here involved was an absolute sale, that the possession and title to the property sold vested in the vendee, and that the vendor has no claim thereto except as creditor in common with others who must suffer by the insolvency of the vendee.

The \$14,266.67 now in the hands of the United States Government, the balance still due on this machinery, must be paid over to the receiver of the William R. Trigg Company, as part of the general assets of that concern, to be distributed under the orders of the court to those entitled thereto.

Under the contract between the United States and the Trigg Company, all parts of the machinery paid for by the government under specified system of partial payments became thereby the sole property of the United States, and as already pointed out this provision formed a part of the contract of the Trigg Company with the Bucyrus Company. The appellants contend that the title to the machinery did not vest to any ex-

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tent in the United States as against the creditors of the Trigg Company, because the contract under which the government claims was not recorded as required by section 2462 of the Va. Code, 1904.

Without expressing any opinion upon the question whether or not the contracts of the United States come within the recording acts of Virginia, it is sufficient to say that this case does not come within the category of contracts which are required to be recorded by the section mentioned. No title was reserved in the contract, and there is no element of a conditional sale about the transaction.

It is further contended by the appellants that the United States should be required to pay interest on the balance ascertained to be due by it on account of the machinery in question.

It is well settled by the decisions of the Supreme Court that in no case is interest allowable on claims against the government unless the government has stipulated to pay interest, or it is given by express statutory provision. *Tillson v. United States*, 100 U. S. 43, 25 L. E. 543; *Angarica v. Bayard*, 127 U. S. 251, 8 Sup Ct. 1156, 32 L. Ed. 159. In the case last cited, after stating the facts, the court says: "The case, therefore, falls within the well settled principle that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect. It has been established, as a general rule in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or tort, and whether they arise in the ordinary business of administration or under private acts of relief passed by Congress on special application. The only recognized exceptions are, where the government stipulates to pay interest, and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages."

In the case at bar, neither the stipulation filed by the learned counsel for the government, nor the act of Congress under which

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the stipulation was filed, contains any recognition of a liability on the part of the government to pay interest. It is true the stipulation declares that its object is to secure to any and all claimants the fullest possible protection and security in and to their respective rights and claims. The fullest security possible was that given by sections 3753 and 3754 of the revised statutes of the United States, under which the stipulation was filed. The intention and effect of the stipulation was to conform to the act of Congress, and if it had contained any provisions not authorized by the act of Congress such additional provisions would have been without legal effect. It follows, from the authorities cited, that the fund held by the United States Government, awaiting the determination of its rightful owner, does not bear interest against the government.

The decree appealed from, of July, 1904, after directing the payment to the Bucyrus Company of the balance of \$14,266.67 in the hands of the government, provides that upon its payment the title of the Bucyrus Company in the pumping machinery shall vest in the United States. Counsel for the government calls attention to the fact that upon the surrender of the property in question, under the stipulation which was filed, the title vested by operation of law in the United States, and that the provision of the decree, that it should vest when the money was paid to the Bucyrus Company, was, therefore, error, and asks that the decree be corrected in that respect.

The point is well taken; but, as we have held that the Bucyrus Company has no title to the property, the error is harmless. The error can, however, be avoided in the decree to be hereafter entered.

For these reasons, the decrees appealed from must be reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

Reversed.

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CHESAPEAKE & OHIO RAILWAY CO. v. WHITLOW.

June 15, 1905.

Absent, Keith, P.

1. INSTRUCTIONS—*Contradictory—Effect on Verdict.*—Where contradictory instructions on a material point in a case have been given, the verdict of the jury should be set aside as it cannot be said whether the jury were controlled by the one or the other.
2. NEGLIGENCE—*Concurring Negligence of Plaintiff.*—If malaria, which is the foundation of an action, may have been caused as well by the condition of plaintiff's premises as by stagnant water on the premises of the defendant, it is error to instruct the jury to find for the plaintiff if they believe that the "stagnant water was the principal and substantive cause of the injury complained of, even though other causes may have contributed to a lesser extent." The law will not undertake to balance the negligence of the respective parties to ascertain which was most in fault. The plaintiff must prove by a preponderance of evidence that the injury complained of was occasioned by the fault or negligence of the defendant before the latter can be held liable therefor.

Error to a judgment of the Circuit Court of Fluvanna County in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

A. K. and D. H. Leake, for the plaintiff in error.

Daniel Harmon and F. C. Moon, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

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This action was brought by George W. Whitlow against the Chesapeake and Ohio Railway Company to recover damages, caused by the negligence of the defendant company, the specific cause of complaint alleged being that the defendant company negligently allowed stagnant water, decayed vegetation, mud, etc., to accumulate and remain upon and along its right of way where it passes through the farm on which the plaintiff resides in the county of Fluvanna, in consequence whereof the plaintiff and his family became sick with malaria, etc.

There was a verdict in the lower court in favor of the plaintiff for \$800, and a judgment thereon, which we are asked to review and reverse because of the action of the trial court in over-ruling the demurrer to the declarations filed by the plaintiff, for misdirection of the jury in the instructions given, and refusing the defendant company a new trial on the ground that the verdict is contrary to the law and the evidence.

The plaintiff with his family, consisting of his wife and seven children, moved upon a farm in Fluvanna county in 1898, and has since occupied it, the legal title to the farm being in the wife. The defendant company is the successor of the Richmond & Alleghany Railroad Company, and as such succeeded to the ownership of the property and franchises of the James River and Kanawha Canal Company, including the old canal which passes through the farm upon which the plaintiff resides, upon the tow-path of which the railroad track is laid, the residence of the plaintiff being about 100 to 140 yards therefrom. By the act of the assembly (*Acts, 1878-'9, 119,*) authorizing the R. & A. R. Company, the predecessor in title of the defendant company, to acquire the canal and convert it into a railroad, imposed upon the railroad company the duty to so drain the same as not to leave stagnant water by which the health of citizens along the line of the canal might be injuriously affected. That this duty was incumbent upon the defendant company is not denied; nor is it claimed by the plaintiff that prior to 1901 that duty was neglected.

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In July and August, 1901—that year and the two years following being very wet—the plaintiff's wife complained to the employees of the defendant company that the canal was not properly drained, and that her family were made sick with malaria in consequence of such negligent drainage, and thereupon the supervisor of that part of the railroad track had it gone over and drained properly, as he thought, but not sufficiently, as the plaintiff claims. Wherefore the plaintiff brought suit covering the period from August 11, 1901, to August 11, 1902, and subsequently brought another suit covering the period from November 11, 1902, to November 11, 1903, and by consent these suits were merged into one, so as to embrace these two periods, and tried as one case, with the result above stated.

The demurrer to the declarations was not urged in the oral argument here, and we deem it only necessary to say with reference thereto that the court is of opinion that the declarations and each of the counts contained therein set out sufficiently and clearly a good cause of action.

Upon its plea of not guilty, the defendant company relied upon the theory, which appears to be a concession in the case, at all events the evidence in support of the theory is not contradicted, that malaria is caused by the bite of a mosquito of the genus *anopheles*, which itself must have become infected by sucking the blood of a patient suffering from the disease, thereby taking into its system the malarial parasite, and that at least the insect itself might just as well have been propagated on the premises of the plaintiff as in the old canal bed.

While the evidence showed that the plaintiff and his family suffered from malaria during the periods mentioned, and had suffered from it before, and that the conditions in the canal bed were sufficient for the propagation of the malarial insect, it also tended to show, that the conditions on the plaintiff's own low-grounds, about his spring and about an excavation made near his dwelling for an icehouse, were equally, if not more, favorable for the development of the malarial mosquito than the conditions about the canal bed.

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The defendant company asked for five instructions, all of which were given as asked, except the third, and this was also given with a modification, this modification constituting the defendant company's first bill of exceptions. This instruction, as given, is as follows, the modification or addendum appearing in italics:

"The court instructs the jury that if they believe from the evidence that the sickness which the plaintiff claims to have suffered may as well have resulted from other causes as from stagnant water in the canal bed, then they must find for the defendant, *unless they should believe from the evidence that the said stagnant water was the principal and substantive cause of the injury complained of even though other causes may have contributed to a lesser extent in which case they shall find for the plaintiff.*"

Among the other instructions given for the defendant company is No. 5, which is as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiff, by his own negligence, suffered or permitted stagnant water to remain *in* upon his own premises, which did contribute in any degree to cause the sickness of which he claims to have suffered, then they must find for the defendant."

The jury were also instructed that if the defendant company had used reasonable and prudent means to keep the canal bed drained, and to prevent the accumulation of stagnant water therein, they should find for the defendant, even though they may believe that by the exercise of greater care and skill, better and more efficient methods might have been employed to accomplish such purposes. So that we have, as it appears to us, in instruction No. 3, as modified, an instruction not only inconsistent with other instructions, but directly contradictory of instruction No. 5, thus constituting an error which may not be cured by other instructions given, as it cannot be said in such a case whether the jury were controlled by the one or the other.

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N. & W. Ry. Co. v. Mann, 99 Va. 187, 37 S. E. 849; *Winchester v. Carroll*, Ibid 745, 40 S. E. 37; *Va. & N. C. Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976; *Richmond Pass. & Power Co. v. Steger*, 101 Va. 319, 43 S. E. 612, and authorities there cited.

Instruction No. 3, as asked, was a plain statement of the law applicable to one aspect of the company's evidence not covered by other instructions, and the modification or addendum thereto is a misapplication to the case of the doctrine of *concurrent* negligence, viz: where concurrent negligence of two persons injures a third person, the person injured can recover of either or both; or, if the concurrent or successive negligence of two persons combined results in an injury to a third person, he may recover damages of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury. As illustrative of the application of this doctrine to the case at bar, counsel for the plaintiff say that "if two parties, acting entirely separately and independently, each create a separate pond of stagnant water, both of which concur in causing sickness to a third party, then either separately or both jointly are liable for the injury sustained, and in an action against one alone he could not plead in defense the concurrent act of the other."

The doctrine invoked is undoubtedly well established, and the deduction drawn therefrom is, in the abstract, sound, but neither are applicable to this case.

The case here falls under that class sanctioning the rule as stated by all text-writers, that where damages are claimed for injuries which may have resulted from one of two causes, for one of which the defendant is responsible, and for the other of which he is not responsible, the plaintiff must fail if his evidence does not show that the damages are produced by the former cause. And he must also fail if it is just as probable that the damages were caused by the one as by the other, since the plaintiff is bound to make out his case by a preponderance

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of the evidence. *N. & W. Ry. Co. v. Poole*, 100 Va. 148, 40 S. E. 627; and authorities there cited. *A fortiori* he must fail if the damages resulted wholly from his own negligence; and if from his negligence of a greater or lesser degree concurring with that of the defendant, the law will not recognize a gradation of the fault and he still must fail.

Conceding the negligence of the defendant company in not keeping the old canal bed properly drained, thereby causing conditions from which malaria might be contracted, there was, as we have seen, evidence tending to show that the conditions on plaintiff's own premises were such that the sickness of which he complains may as well have been caused thereby as by the conditions in or along the old canal bed, yet instruction No. 3, as given, authorized the jury to find for the plaintiff even though they believed that such was the condition of plaintiff's premises, thus directing them to balance the negligence of the parties and to determine which was the more at fault—leaving them to “conjecture, guess, or random judgment upon mere supposition.”

“The court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most in fault. The law recognizes no gradation of fault in such cases.” *Richmond Traction Co. v. Martin*, 102 Va. 205, 45 S. E. 886.

It is not sufficient that the plaintiff show that the malaria causing himself and family sickness may as well have been caused by the condition of the old canal bed as by the conditions existing upon his own premises. If the evidence, as the jury might have concluded, showed that it is just as probable that the damages were caused by the condition of his own premises, the plaintiff could not recover, since by a preponderance of the evidence showing that the defendant company's negligence caused the injury he must alone recover and not by conjecture or inference on the part of the jury as to whether the malaria causing the same arose from the canal or from the premises of the plaintiff.

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"An inference cannot be drawn from a presumption, but must be founded upon some fact legally established."

"Every party to an action at law has a right to insist upon a verdict or finding based upon the law and the evidence in the case, and not, in the absence of evidence, upon mere inference and conjecture when liability depends upon carelessness or fault." *So. Ry. Co. v. Hall*, 102 Va. 135, 45 S. E. 867.

It follows from what has been said that instruction No. 3, as asked by the defendant company, correctly stated the law, and should have been given without the modification or addendum thereto, and having reached this conclusion it is unnecessary to consider the other assignment of error as to the sufficiency of the evidence to sustain the verdict.

The judgment of the Circuit Court will therefore be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had in accordance with this opinion.

Reversed.

Syllabus.

Wytheville.

CHESAPEAKE & OHIO RAILWAY CO. v. F. W. STOCK & SONS.

June 15, 1905.

Absent, Cardwell, J.

1. **VERDICTS**—*Interest*.—This court will not disturb the verdict of a jury allowing interest from November 1, on an admitted loss of freight by a railway company occurring October 18, preceding.
2. **ASSUMPSIT**—*Declaration—Action for Failure to Deliver Goods*.—A declaration against a common carrier for failure to deliver goods which sets forth the consideration, the promise, and the breach, and that notice in writing was given by the plaintiff to the defendant as prescribed by the bill of lading, is good as a declaration in assumpsit upon an express contract.
3. **BILL OF PARTICULARS**—*Insufficiency—Harmless Error*.—The ruling of a trial court on the sufficiency of a bill of particulars filed by the plaintiff will not be reversed where it is evident that the defendant was not embarrassed or hindered in any degree in making his defense.
4. **EVIDENCE**—*Carbon Copies*.—A carbon copy of a paper made by the same impression of type as the original and at the same time (but not a letter press copy) may be regarded as a duplicate original, and may be introduced in evidence without notice to the opposite party to produce the other.
5. **EVIDENCE**—*Offer of Compromise*.—Admissions not made "without prejudice," or when not plainly shown to have been made as a concession or sacrifice in an effort to buy peace may be given in evidence.
6. **COMMON CARRIERS**—*Loss of Goods—Damages*.—In case of loss of goods by a common carrier, the measure of damages is the value of the goods at the place of destination, with interest from the time they should have been delivered, less costs of transportation, notwithstanding the bill of lading limits liability to value at place of shipment. The limitation will be disregarded as against public policy.
7. **COMMON CARRIERS**—*Connecting Carriers—Partners—Agents*.—A connecting carrier cannot, as a rule, be held liable for the default of the initial or other connecting carrier in the absence of a partnership, agency, or

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some similar relation, and the relationship of the carriers must be averred in the pleadings when it appears that the loss occurred on another line.

8. **PLEADING—Bill of Particulars—Declaration.**—A bill of particulars is no part of the declaration and statements contained therein cannot be read into the declaration.
9. **COMMON CARRIERS—Connecting Carrier—Liability—How Averred.**—If, in an action against a common carrier to recover for a loss on a connecting line, it be averred in the declaration that the two carriers were joint contractors, and in an amended declaration this averment be omitted and nothing equivalent or akin to it be inserted, and there is a verdict against the defendant, it should be set aside, for without some such averment, or an averment of some kind to fix the liability of the defendant there could be no recovery against it, and it is impossible to tell on what count the jury found their verdict.
10. **COMMON CARRIERS—Connecting Carrier—Liability.**—Whether a carrier is liable for the loss of goods by a preceding carrier on the route depends upon whether the carrier assumed or held itself out to the public as assuming such liability. The mere agreement to carry all freight delivered to it by the preceding carrier at an agreed rate of freight does not render the two carriers jointly liable, nor make them partners.
11. **SCINTILLA DOCTRINE DISAPPROVED.**—The scintilla doctrine heretofore prevailing in this State by which the court was compelled to give an instruction if there was any evidence whatever to support it, although it might be compelled to set aside a verdict rendered in accordance therewith, is not consonant with reason, nor promotive of good results in the administration of justice.
12. **INSTRUCTIONS—Refusing Erroneous Instructions—Duty of the Court.**—If an instruction is right and there is evidence to support it, it should be given. If it be equivocal it should be amended. If it be wrong in form or substance it should be rejected, and there is no obligation on the court to correct it and then give it. A party cannot, by asking an erroneous instruction, devolve upon the court the duty of charging the jury on the law of the case.

Error to a judgment of the Circuit Court of Elizabeth City county in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

R. G. Bickford and S. O. Bland, for the plaintiff in error.

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H. G. Avery and Gordon Paxton, for the defendant in error.

KEITH, P., delivered the opinion of the court.

Stock and Sons made two shipments of flour from points in the State of Michigan to Phoebus, in the State of Virginia. The first shipment was made in October, 1902, in car No. 5905; the second in February, 1903, in car No. 25578. There was a loss of goods upon each shipment, for which Stock and Sons brought an action of assumpsit against the Chesapeake and Ohio Railway Company.

The loss claimed upon the goods shipped in car No. 5905, amounting to \$612.75, was paid into court, and there is no controversy with respect to it, except as to the allowance of interest from November 1, 1902; the contention of plaintiff in error being that it was entitled to reasonable time after the goods should have been delivered to ascertain if it was liable.

The injury to car No. 5905 occurred on the 18th of October. There is no dispute about the amount or the liability. The money has been paid into court, and even upon the theory of plaintiff in error as to the extent of its liability for interest, that it was entitled to a reasonable time to investigate as to its liability, and that pending such inquiry the amount for which it was found to be responsible should not bear interest, we would not disturb the verdict of the jury, which gives interest from the 1st day of November.

The real contention in the case is in respect to plaintiff in error's liability for loss of the goods shipped in car No. 25578. There seems to be no controversy with respect to the amount of the loss, which was \$758, and a settlement was only prevented by disagreement with reference to the allowance of interest. The parties not being able to agree, this suit was instituted, resulting in a verdict for \$612.75, with interest from the 1st of November, 1902, and for \$758, with interest from March 1, 1903; to be credited by the sum of \$612.75, the amount paid into court.

Opinion.

The first assignment of error is to the judgment of the court overruling a demurrer to the declaration.

We are of opinion that the declaration is sufficient.

Speaking of actions in assumpsit, *Hutchinson on Carriers* (2nd Ed.), at section 744, says: "Notwithstanding these essential differences between actions on the case and in assumpsit against the carrier, it seems to have been in former times a very perplexing question how the one form of action should be distinguished from the other. The declarations in the two kinds of actions, according to approved formulas, were so nearly alike that in many cases the astutest judges became perplexed in their efforts to find out to which class the declarations belonged. It seems, however, to be finally settled that while the allegation of a promise in the declaration will not be sufficient to impress upon it the distinctive feature of a declaration upon the contract, because the words 'agreed,' 'undertook,' or even the more significant word, 'promised,' must be treated as no more than inducement to the duty imposed by the common law, yet if there be an averment of a promise and a consideration the declaration will be construed to be upon the contract, and not for the breach of duty. And consequently, when the word 'consideration' was left out, the action was held to be in tort."

The difficulty is doubtless a survival of the time when assumpsit, though founded upon contract, was deemed a species of action on the case, having its origin in a wrong. 4 *Cyc.* 320; *Encyc. Pl. & Pr.*, Vol. 2, p. 988.

The first six counts state a cause of action arising upon an express contract. They set forth the consideration, the promise, the breach, and that notice in writing was given by the plaintiffs to the defendant, as prescribed by the bill of lading. The seventh count is in the usual form of a general count in assumpsit, and is free from objection.

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The second assignment of error is to the refusal of the court to require plaintiffs to show in the bill of particulars where the goods and chattels, and cars, in the bill of particulars mentioned, were delivered to the defendant.

It is evident that the plaintiff in error was not embarrassed or hindered in any degree in making its defense by the lack of this statement, and this assignment of error is overruled.

The third, fourth, seventh, and eighth assignments of error are with respect to the notice of the claim of loss. The court permitted a letter to be introduced from Stock & Sons to A. R. Sydnor, dated March 31, 1903, addressed to him as agent of the Chesapeake and Ohio Railway Company at Norfolk, Virginia, the receipt of which was acknowledged by Sydnor on April 1, 1903.

The contention of plaintiff in error is, that copies of a letter cannot be admitted in evidence where no notice has been given to produce the original, and no foundation laid for the introduction of a copy. To this the defendant in error replies that a letter-press copy is not regarded as equivalent to the letter itself, but a carbon copy, which is made at the same time and by the same impression of type with the letter, may well be regarded as a duplicate original with the letter itself. And we think this position is sound.

As was said in *Hubbard v. Russell*, 24 Barb. 404, "If two letters are written at the same time to the same person, one being the exact counterpart of the other, one being sent to the person addressed and the other retained by the writer, each is an original, and the one retained may be put in evidence by the party who retained it, without notice to the opposite party to produce the other."

We can find in the record, however, no satisfactory proof that the letter objected to was a carbon copy made at the same time and by the same impression of type with the letter, and therefore to be regarded as a duplicate original of the letter itself.

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It is also contended on behalf of the defendant in error that the admission of these letters was at most harmless error, because the stipulation that the carrier shall not be liable for loss or injury unless the claim therefor is presented in writing within a specified number of days after the occurrence of the injury has no application, and is not to be considered in cases where the carrier was of necessity aware of the loss and of its extent, as where there is a complete failure to deliver, or where the injury to the goods was examined by the carrier's agent in person for the purpose of ascertaining its extent (citing 5 *Am. & Eng. Ency.* 324, 6 *Cyc.* 506); while in this case both carloads of the damaged flour were sold by the defendant and the proceeds received by it.

As this case must go back for a new trial upon another ground, when the difficulty here presented can doubtless be obviated, we will pass to the next assignment of error.

It seems that W. L. Williams was local counsel of the Chesapeake and Ohio Railway Company at Norfolk; that a suit had been instituted at Norfolk by Stock & Sons against the Chesapeake and Ohio Railway Company, in which suit were involved a car consigned to Norfolk, and also those involved in the present suit. Mr. Williams testified that he received from the general counsel of the Chesapeake and Ohio Railway Company, after the institution of the suit at Norfolk, three vouchers, with which to make settlement of the alleged claims, and that he offered a sum in settlement of the suit which aggregated the three vouchers. The contention of the plaintiff in error is, that this offer was made by the railway company to buy its peace, and was made for the Kanawha and Michigan Railway Company. The principle is invoked by the plaintiff in error, that offers made in an effort to compromise threatened or pending litigation are inadmissible in evidence; that a party may with impunity attempt to buy peace; and that the rule is general both in England and the United States that the offer will be presumed to have been made without prejudice if it was plainly an offer of compromise. *West v. Smith*, 101 U. S. 273, 25 L. Ed. 809.

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In *Brown v. Shields*, 6 Leigh. 440, speaking of a letter which was admitted by the trial court over the objection that the offer was made by way of compromise, Judge Carr says: "To my apprehension, that letter does not come within the rule of exclusion, according to the authorities cited. There was no treaty for a compromise on foot; the latter asked for none; proposed no meeting, no arbitrators; offered no purchase of peace. Buller says, if the terms 'buy their peace' be attended to, they will resolve all doubts on this head of evidence; and Bayley, J., says, that the 'essence of an offer of compromise is that the party making it is willing to submit to a sacrifice, and to make a concession.' There is no such thing in this letter. The spirit it breathes is wholly different. . . . I do not think that this letter was either written upon a pending treaty for a compromise, or was meant to propose a compromise, or to state terms to which the writer would submit, or sacrifices or concessions which he was willing to make 'to buy his peace.'"

In 1 *Greenleaf* (16 Ed.), sec. 192, it is said: "It is to be observed that confidential overtures of pacification, and any other offers or propositions between litigating parties, expressly stated to be made without prejudice, are excluded on grounds of public policy. . . . But if it is an independent admission of a fact merely because it is a fact, it will be received; and even the offer of a sum by way of compromise of a claim tacitly admitted is receivable, unless accompanied with a caution that the offer is confidential."

There was no such caution given in this case, nor can we say that the facts plainly show that the admission was made as a concession or sacrifice, in an effort upon the part of plaintiff in error to buy its peace.

The ninth assignment of error is to the giving of two instructions asked for by defendant in error, the first of which is as follows:

"The court instructs the jury that the measure of damages in

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case of loss of goods by a common carrier is the value of the goods at the destination to which he undertook to carry them, with interest on such value from the time when the goods should have been delivered, after deducting the costs of transportation, if this has not been paid."

The objection urged by plaintiff in error to this instruction is that the bill of lading provides that the measure of damages in case of loss or injury is the value of the goods at the place and time of shipment, and not at the point of delivery.

The instruction is taken from *Hutchinson on Carriers* (2nd Ed.), sec. 769, and the rule seems to be a reasonable one.

In the *Southern Pacific Co. v. D'Arcais*, 64 S. W. 813, the Texas Court of Civil Appeals held, that "The measure of damages for loss of goods by the negligence of a carrier in transportation is the value of the goods at the place of destination. A stipulation in the contract of shipment, limiting the liability to value at place of shipment, will be disregarded as against public policy, notwithstanding it was an interstate shipment."

In *Mobile Ry. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527, the syllabus states, that in an action against a carrier for the loss of goods the measure of damages is the value of the goods in the place where they were to have been delivered, with interest. See also *Railroad Co. v. Williams* (Tex. Civ. App.), 31 S. W. 556; *Galveston R. Co. v. Ball* (Tex. Sup.), 16 S. W. 441.

Plaintiff's second instruction is as follows:

"The court instructs the jury that even if they believe from the evidence that car No. 25578, involved in this suit, was wrecked before it came upon the rails of the defendant's road, yet if they also believe from the evidence that the defendant was liable and responsible for the transportation of the said car from the point where the same was loaded to Phoebus, Virginia, then they shall find for the plaintiffs."

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The goods in controversy were shipped from a point in Michigan over several connecting lines to Gauley, in the State of West Virginia, where they were to be delivered to the Chesapeake and Ohio Railway for carriage to Newport News. The loss occurred by a wreck which took place before the car in which the goods were shipped had reached the point at which it was to be delivered to the plaintiff in error.

"A connecting carrier cannot, as a rule, be held for the default of the initial or of other connecting carriers in the absence of a partnership, express or implied." 4 *Elliott on Railroads*, sec. 1444.

To impose liability upon a connecting carrier for a loss not occurring upon its portion of the through route, there must be some allegation in the pleadings which establishes the relation of principal and agent, or some similar relation, as, for instance, that they were participants in common in the profits of the business. For, a partnership may be formed as well in the business of carriers as in any other, and between corporations engaged in that business as well as between individuals, so as to make them individually and jointly liable. *Hutchinson on Carriers*, sec. 158.

"In suing the last of several connecting carriers for a loss, it is necessary to allege that the carriers were joint contractors, or that the property was delivered to and received by the defendant. If, however, several carriers associate and form a continuous line, and contract to carry goods through for an agreed price, which the shipper pays in one sum, and which the carriers agree to divide among themselves, they are jointly and severally liable for a loss on any part of the line, and the word 'partners,' or any particular word to describe the relation existing between the carriers, need not be used in the petition." 3 *Ency. Pl. & Pr.*, 853.

"The joint arrangement between the connecting lines may be such as to make each the agent for the other in undertaking the continuous transportation of goods." 6 *Cyc.*, 478.

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The original declaration in this case charged, that the Chesapeake and Ohio Railway Company was a common carrier of goods and chattels, along with other connecting lines, namely, the Lake Shore & Michigan Southern Railway Company, and Toledo & Ohio Central Railway Company, which latter carrier, with the defendant, form a part of the railway line known as the Kanawha Dispatch, which common carriers aforesaid were joint and several contractors for hire, in and by a certain train of railway cars, from a point in Michigan, to Phoebus, Virginia. But the plaintiffs saw fit to file an amended declaration, in which this allegation does not appear, nor anything which is the equivalent of or akin to it. In the bill of particulars which the plaintiffs filed it is stated, that wherever the words "joint and several contractors" occur in the original declaration, the same shall, for the purposes of the bill of particulars, be read as "agents one of the other." But we are confronted with the difficulty, that the bill of particulars is no part of the declaration.

The situation, then, is as follows: The original declaration passed out of the case when the amended declaration was filed; the amended declaration does not contain any averment of the relations existing between the Chesapeake and Ohio and the connecting carriers essential to impose liability upon it for a loss sustained before the goods were received by it. The objection would not, indeed, be met if the original declaration is still to be considered as a part of the complaint in the case, for the amended declaration contains seven counts, not one of which makes any reference to the relation under consideration, and there are no means of knowing upon what count the verdict of the jury was founded.

But apart from the question of pleading, which might have to be disregarded, as objection upon this ground was not made in the trial court, it yet remains that the allegation, if to be considered as sufficiently made, is not supported by the proof.

The evidence relied upon by the defendants in error to support the instruction which was given, imposing upon the plaintiff

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in error liability for through carriage, consists of the bill of lading, which contains this statement: "Upon all the conditions, whether printed or written, herein contained, it is mutually agreed that the rate of freight from the above named station to destination is to be 15½ cents per 100 lbs., c/o K. D., order F. W. Stock & Sons, notify E. M. Tennis, Phoebus, Va.;" and a letter of E. L. Jamison, introduced by plaintiff in error, which is to the following effect:

"J. F. Orndorff, Esq.,

"A. G. F. A., C. & O. Ry., Richmond, Va.

"Dear Sir:

"East Toledo, O., to Phoebus, K. D. way-bill 27, Feb. 11th, covers C. S. R. car 25578, loaded with 100 barrels of flour and 1600 1/16 sacks of flour, from Hillsdale, Mich., consigned to order F. W. Stock & Sons, notify E. M. Tennis, Phoebus, Va. Unfortunately this shipment was caught in a wreck on our line Feb. 13th, and the flour was transferred into N. Y. P. & O. car 44212.

"Our reports indicate that there was a loss of 32 of the small sacks on account of sacks breaking; also one barrel destroyed; and in addition to this there were about ten barrels with their heads out of one end, allowing some of the flour to fall out. We decided to let this shipment as transferred go forward to final destination. There will, of course, be claim for damages which we will have to stand for, and I give you this information in hopes that you handle the shipment to the best advantage possible.

"I trust that the damage as above indicated will cover it, and that you may be able to make delivery and accept claim for our account for the actual damage. Please advise.

"Yours truly,

"E. L. JAMISON."

In *St. Louis Ins. Co. v. St. Louis, &c., R. Co.*, 104 U. S. 146, 26 L. Ed. 679, it is held, that the liability of a railroad com-

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pany for the safe carriage of goods after their delivery to the next succeeding carrier on the route, depends upon whether such company, in any form, assumed or held itself out to the public as assuming such liability. The carrier is only bound to carry safely to the end of its line, and there deliver to the next carrier in the route. An arrangement between a dispatch company and sundry railroad companies, whereby the latter, separately, agreed to carry all goods for the transportation of which the former should contract, at the established tariff rates, or at any special rates furnished by the railroad companies, it was held did not involve joint liability upon the part of the railroad companies, or make them partners, either *inter sese* or as to third persons.

Now that case is one where it was sought to hold the initial carrier responsible for a loss occurring after the goods had been delivered by it to a connecting carrier, upon the ground that the Erie & Pacific Dispatch Company, in whose custody the goods were when lost, was the agent of the defendant company.

The evidence relied upon in this case does not, we think, go further in the direction of establishing an agency among the constituents composing the Kanawha Dispatch than that held to be insufficient in the case just cited. We think that the evidence, as it now stands, is too meagre to justify the instruction given.

It is true that what is known as the *scintilla* doctrine, has heretofore prevailed in this State, by force of which courts have been required to give instructions though the evidence by which they were to be supported was such that a verdict founded upon it could not be maintained. In other words, a trial court might, under what is known as the *scintilla* doctrine, be reversed for failure to give an instruction which rightly propounded the law, and then be again reversed for sustaining a verdict in obedience to the instruction, because not supported by sufficient evidence. Such a doctrine does not seem consonant with reason, nor promotive of good results in the administration of justice.

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The burden, of course, was upon the plaintiffs to make out their case in all its aspects against the defendant, and when it appeared that the loss had occurred before the goods were received by the defendant, the plaintiffs should have shown such relations existing between the road upon which the accident occurred and the plaintiff in error as rendered the latter responsible for the default of the former.

The eleventh assignment of error is a novel one. After the jury had been instructed, plaintiff in error presented the following request to the court:

"The defendant prays the court that should the hypothesis of the facts whereon the several instructions propounded by it be incorrect, or should the said instructions be inartificially or incorrectly expressed, or should the conclusion of law therein announced be incorrectly stated, that the court will so amend the same as to accord with the facts and law of this case, to the end that the jury may be duly instructed on the phases of the case at bar presented by the said instructions."

Which the court refused, and made upon it the following endorsement:

"The court stands by its action on the instructions as noted thereon (both collectively and generally), in view of the multitude of instructions tendered. The court does not propose to make a summary of them, or to write and give to the jury a dissertation of the law of damages. The court is of opinion that the instructions in this case, as in most similar cases, go beyond the province of instructions and only tend to confuse the jury, and possibly cause a reversal in the Supreme Court because of error in giving or refusing instruction which do not instruct."

"To which action of the court in so refusing to conform with the said prayer, and the reading of its refusal in the presence of the jury, the defendant, by counsel, excepted, and prays that this its bill of exceptions, marked 13, may be signed, sealed and made a part of the record in this cause which is accordingly done."

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This court has held in numerous cases that a trial court is bound to give any instruction asked for by either party, which correctly expounds the law upon the evidence before the jury. "But if such instruction does not correctly expound the law, the court, as a general rule, may refuse to give it, and is not bound to modify it or give any other instruction in its place. This principle is founded on good reasons and is sustained by much authority. A party cannot, by asking for an erroneous instruction, devolve upon the court the duty of charging the jury on the law of the case. An instruction, as asked for, may be so equivocal, that to give or refuse it might mislead the jury, and thus it might have all the effect of an erroneous instruction. In such a case, it would be proper for the court to modify the instruction so as to make it plain." *Rosenbaums v. Weeden, &c.*, 18 Gratt. 799, 98 Am. Dec. 737; *B. & O. R. Co. v. Polly, Woods & Co.*, 14 Gratt. 448; *Peshine v. Shepperson*, 17 Gratt. 472, 94 Am. Dec. 468.

In *Keen's Ex'or v. Monroe*, 75 Va. 428, the court says: "We are of opinion that after refusing to give the instruction which the defendant below proposed to the court to give, upon the ground that it did not rightly propound the law, it was not incumbent on the court, unasked, to instruct the jury as to what was the law. If an instruction asked does not correctly expound the law, the court, as a general rule may refuse to give it, and is not bound to modify it, or give any other instruction in its place unless the instruction asked for is so equivocal that to give or refuse it might mislead the jury; in such case it would be proper for the court to modify the instruction so as to make it plain." *Bertha Zinc Co. v. Martin's Admr.*, 93 Va. 791, 22 S. E. 869.

It cannot be doubted that, if the instruction correctly states the law, and there be sufficient evidence to support the verdict, it should be given. It is equally plain that if it does not correctly state the law, it should not be given. The sole question is as to the duty of the court to amend an instruction offered by counsel. The rule as stated in *Rosenbaums v. Weeden, supra*, and approved in numer-

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ous decisions of this court, is that when an instruction offered is equivocal, so that either to give or refuse it might mislead the jury, the duty is imposed upon the court so to modify it as to make it plain; that if it be right, it should be given; if it be wrong, it should be rejected; if it be equivocal, it should be amended. By what test is a court to measure the duty thus imposed, and how is a jury to be misled by an instruction which the court declines to give? An equivocal instruction of course should not be given, because an equivocal instruction is an inaccurate expression of the law, and for that reason should be refused. To say that a jury may be misled by a refusal to give an instruction, and therefore the instruction should be amended and given, is to prescribe a rule so vague and indefinite as to embarrass rather than to assist trial courts in the performance of their duty. It is the duty of juries to respect the instructions given them. It is not to be supposed that they have any knowledge with respect to those which the court refuses to give; and finally, if it be conceded that the offer of instructions, their discussion, and the judgment of the court upon them, take place in the presence of the jurors, it is an impeachment of their integrity, or of their intelligence, to assume that they were influenced or misled by what has occurred.

But however this may be, we know of no authority, in this court or elsewhere, which imposes upon trial courts the burden sought to be placed upon them by the "prayer" under consideration.

The rule which prevails in other jurisdictions is thus stated in *Blashfield on Instructions to Juries*, sec. 137, and is supported by the great weight of authority: "In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification or omission. If the instruction, as requested, is objection-

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able in any respect, its refusal is not error. A party cannot complain that the court did not, of its own motion, modify and correct the request and then give it as corrected. No such duty rests upon the court."

The twelfth assignment of error is to the refusal of the court to set aside the verdict.

As the evidence plainly shows that no damage was sustained by the defendant in error while the goods were in the custody of plaintiff in error, the judgment of the court must, for the reasons herein stated, be reversed, the verdict set aside, and the case remanded for a new trial.

Reversed.

Syllabus.

Wytheville.

SEABOARD & ROANOKE RAILROAD CO.

v.

VAUGHAN'S ADMINISTRATRIX.

June 15, 1905.

Absent, Cardwell, J.

1. **PLEADING**—*Declaration—Allegation of Negligence.*—In an action for a personal injury inflicted by a railroad company at a public crossing, a declaration is bad which does not charge either that the company was guilty of negligence in the management of its trains as it approached the crossing which misled the plaintiff or put him in peril; or that, after the defendant knew, or by exercise of ordinary care could have known, of his peril, it could have avoided the injury; or a state of facts which showed that the defendant was guilty of negligence.
2. **RAILROADS**—*Crossing—Negligence—Case at Bar.*—The evidence in this cause shows that the plaintiff's intestate was guilty of negligence, but fails to disclose negligence on the part of the defendant company. The train which inflicted the injury complained of was backing slowly, its bell was ringing, and it was in full view of plaintiff's intestate who approached it riding a bicycle rapidly, and turned down the track in a safe place, and whose peril was not apparent to the company's servants until he fell or was thrown from his bicycle on the track immediately in front of the moving train, when the collision could not be avoided.
3. **INSTRUCTIONS**—*Jury Sufficiently Instructed—Additional Instructions.*—Where the instructions given, or which the court has determined to give, are sufficient to submit the case fairly to the jury, the court is under no obligation to give additional instructions, even though correct, for they are unnecessary. A multiplicity of instructions tends to mislead and confuse the jury, and should be avoided.
4. **INSTRUCTIONS**—*Evidence to Support—Ambiguity.*—An instruction should not be given when there is no evidence on which to base it, nor when it is ambiguous.
5. **TRESPASSERS**—*Duty of Foresight.*—The duty which one owes to a trespasser is to use ordinary care not to injure him after his peril is discovered.

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Error to a judgment of the Circuit Court of Norfolk county in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

G. Hatton, for the plaintiff in error.

R. Randolph Hicks, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

Rosa A. Vaughan, administratrix of Benjamin F. Vaughan, deceased, brought this action against the Seaboard Air Line Railway and the Seaboard and Roanoke Railroad Company for negligently causing the death of her decedent at a highway crossing. The action was dismissed as to the former company, and upon the third trial a judgment was rendered against the other defendant. From that judgment this writ of error was awarded.

The first error assigned is to the action of the court in overruling the defendant company's demurrer to the fourth count of the declaration.

The material allegations of that count are that the plaintiff's decedent was returning home along a common highway in Norfolk county, known as Godwin street, which crosses the defendant company's tracks; that as he was approaching the crossing on a bicycle, at a rapid rate of speed, one of the defendant's trains was backing slowly down the railroad tracks towards the crossing, so that he and the train reached the crossing at the same time; that the plaintiff's intestate, realizing his peril, turned his bicycle down the side of the railroad tracks in order to avoid a collision with the freight train, whereupon it became the duty of the defendant to use reasonable care so that the freight train should not be negligently and recklessly run upon the plaintiff's intestate; yet the said defendant, not regarding its

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duty in that behalf, did not use reasonable care to avoid the collision, but carelessly and recklessly conducted itself so that the rear car of the freight train was run upon and over the plaintiff's intestate, by means whereof he was killed.

The case made by the count shows that the plaintiff's intestate was guilty of negligence in approaching the crossing as he did. There is no charge that the defendant company was guilty of negligence in the management of its train as it approached the crossing which misled or put the plaintiff's intestate in peril, nor is there any averment that after the defendant knew, or by the exercise of ordinary care could have known, of his peril it could have avoided the injury. The count did not aver a state of facts which showed that the defendant was guilty of negligence, and the court erred in not sustaining the demurrer to it. *Hortensine v. Va.-Car. Ry. Co.*, 102 Va. 914, 47 S. E. 996; *N. & W. Ry Co. v. Wood*, 99 Va. 156, 37 S. E. 846.

Upon the first trial there was a verdict in favor of the plaintiff, which was set aside upon the motion of the defendant company. The plaintiff insists, under Rule IX, that the action of the trial court in setting aside that verdict was erroneous, and that this court should so hold and enter judgment thereon under the provisions of section 3486 of the Code.

The motion for a new trial was because the verdict was contrary to the law and the evidence, and for after-discovered testimony.

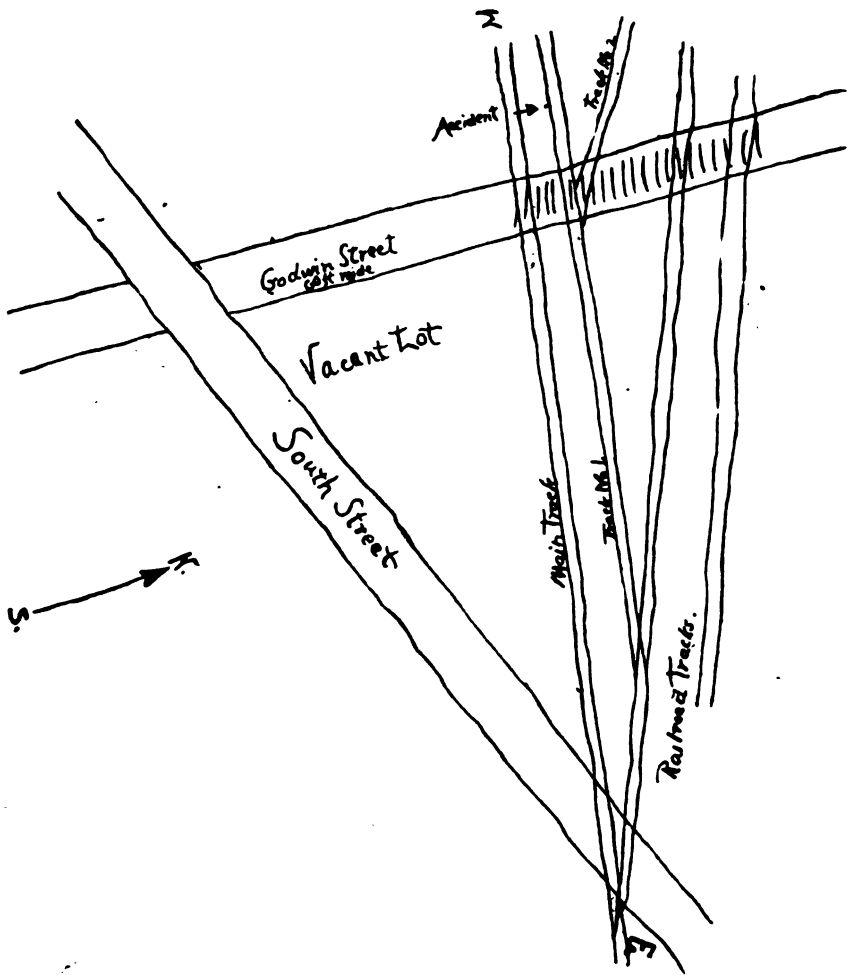
The evidence was substantially the same on the first and last trials. The scene of the accident was in the county of Norfolk outside of the limits of the city of Portsmouth, where Godwin street crosses the tracks of the defendant's road. At that point the street runs north and south and the railroad tracks nearly east and west. The street is sixty feet wide, but only about one-half of it is used at the crossing, which half is covered with plank, leaving a space of about thirteen feet east of the plank to the outer edge of the street, and about seventeen feet from the plank to the western limit of the street. About one

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hundred and seventy feet south of the crossing Godwin street intersects with South street, which runs northeast and southwest and crosses the railroad some three hundred feet east of Godwin street crossing. The diagram on opposite page shows generally the location of the railroad tracks, Godwin street and South street, with reference to each other, at and near the scene of the accident.

The plaintiff's theory of the case was that her intestate, who was going home on his bicycle, traveled along South street from where it crosses the railroad tracks to Godwin street, and thence along that street until he reached the railroad tracks, when he discovered that the rear car of a backing train had blocked the crossing, and to avoid a collision therewith he turned his bicycle, which was going rapidly, into the open space between the main line and switch No. 1 on which the train was backing, and after going from twenty-five to forty feet he was thrown from his bicycle, his head falling on the southern rail of switch No. 1 and was crushed by the rear wheel of the rear car. The plaintiff claims that the defendant was negligent in failing to give notice that its train was going to back, and in not avoiding the injury after it discovered her intestate's peril.

The defendant's theory of the case is that the plaintiff did not approach the crossing over Godwin street from South street, but left South street where it crosses the railroad tracks and traveled on the defendant company's right of way on the south side of its main line until he reached Godwin street, when finding that the rear car of the backing train was passing over the street, he crossed over the main track of the defendant and continued his course between that track and the track upon which the train was moving, and, after having gone from twenty-five to forty feet, either in his effort to get off his bicycle, or because it struck the ties of the track upon which the train was moving, he fell or was thrown upon the rail, his head falling between the wheels of the rear truck of the rear car.



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The only one of the plaintiff's witnesses that testified that her intestate approached the crossing by way of Godwin street from South street was a young lady who was on the western side of Godwin street, north of the railroad tracks. She stated that she was on her way to visit a friend, and as she neared the crossing she heard a train and stopped near an office (some 80 or 100 feet from where the accident occurred) and waited to see if the train would come in sight, and while standing there she noticed Mr. Vaughan come around some bill-boards (which were situated east of Godwin street and north of South street where they intersect, 120 feet or more from the crossing); that he seemed to be riding rapidly, and, as he rode, they (that is, the train and himself) seemed to be racing to the crossing, and they both got there at the same time; that Mr. Vaughan turned his wheel and rode down beside the track; that she watched him and saw that he was in danger; that he went down the track a short distance when his feet seemed to go over his head; that his head struck the rail and was almost cut from his body by the wheel or wheels of the rear truck; that the whole car did not go over his body and that it was stopped suddenly; that it looked to her like he was trying to stop after he turned, but when he came to the track he seemed to be coming very rapidly; that she was on the opposite side of the car from Mr. Vaughan but could see under the car without difficulty his wheel as it went along, and half of his body; that when she first saw the train it was moving in sight at Gordon street crossing; that there was a coal-house or shed between her and the train which prevented her from seeing it until it reached the street; that there was a man with a flag at the crossing, but she did not see him make any motion to stop the train, nor did she hear any bell ring; that Mr. Vaughan in coming from South street toward the crossing could have seen the train if he had looked.

Another witness of the plaintiff testified that Mr. Vaughan and the train reached the crossing at the same time, and when

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he saw the train was going to cut him off he turned his wheel and after going about forty feet was run over by the first wheel of the rear car; that when witness first saw Mr. Vaughan he was about twelve feet from the crossing going at a pretty good speed.

The engineer, who was put upon the stand by the plaintiff, proved that his train of thirteen cars was backing very slowly; that he was moving by signals and was on the lookout; that he did not see Mr. Vaughan and saw nothing of the accident except the bicycle fly up and the signal to stop, when he put on his brakes, reversed the engine, and stopped the train as soon as possible and within five feet he thinks, the track being level or without grade where the train was moving.

Several witnesses of the defendant testified that Mr. Vaughan rode his bicycle on the defendant's right of way south of the main line, from South street crossing to Godwin street parallel to the backing train; that when he reached Godwin street, finding that the rear car had reached and blocked the crossing there, he crossed the main line track diagonally, and continued his way rapidly between that track and switch No. 1, on which the train was slowly backing, and that when he had thus gone from twenty-five to forty feet he fell or was thrown from his bicycle, and his head fell upon the south rail of the track of switch No. 1 and was run over by one wheel of the rear truck of the rear car. They further testified positively that the bell was ringing, and that there was nothing whatever to prevent Mr. Vaughan from seeing the train. The conductor of the train testified that he and one of his brakemen at the time of the accident were at Godwin street crossing to signal the train; that he saw Mr. Vaughan when he crossed the main track at that crossing and turned down between that track and switch No. 1 on the space between the two which was some twelve feet wide, level and smooth, and sometimes traveled by bicycles though there was a sign near there warning trespassers to keep off the premises of the defendant; that there was ample room to ride between the

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two tracks without danger of falling on switch track No. 1, and that he did not think about Mr. Vaughan being in danger until he fell, when he at once signaled, and the train was stopped before the front trucks of the rear car reached his body.

Considered as on a demurrer to the evidence, it clearly appears that Mr. Vaughan was guilty of negligence. The railroad track was a proclamation of danger, and the backing train was in full view and its bell was ringing. It does not appear that the defendant omitted to do anything that it ought to have done in the management of its train as it approached the crossing, or after it was aware of Mr. Vaughan's peril. As soon as he fell or was thrown from his bicycle it did all that was possible to avoid the injury, and it does not appear that any of the defendant's servants knew or ought to have known that he was in peril, if indeed he was in peril, before that time. The mere fact that Mr. Vaughan, who was in the apparent possession of his faculties, as he was shown to have been, when he reached the crossing, turned his bicycle and rode in the open space ten or twelve feet wide between the tracks where persons did ride and could ride with safety, was not a circumstance which showed that he was in peril or made it the duty of the defendant to stop its train to avoid injury to him because he might possibly fall or be thrown upon the track.

We are of opinion, therefore, that the evidence was not sufficient, either upon the first or the last trial to sustain a verdict in favor of the plaintiff, and that the court did not err in setting aside the first verdict, but did err in not setting aside the verdict in the last trial.

There are a number of assignments of error to the action of the court in giving, modifying, and refusing instructions. The questions of law involved in the case were few, yet the court, on the last trial, was asked to give twenty-five instructions, and did give twenty as originally offered, or as modified.

The practice of asking for a great number of instructions in cases which involve few law questions has grown up in recent years, and instead of aiding juries in reaching right conclu-

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sions, tends to mislead and confuse them, and imposes a heavy and unnecessary burden upon trial courts. The general rule, that a party who asks for an instruction which properly states the law and is applicable to the facts of the case has the right to have it given, is not without limitations. Where the instructions given, or which the court has determined to give, are sufficient to submit the case fairly to the jury, the court is under no obligation to give additional instructions, for they are unnecessary, cannot aid, and from their very number may mislead and confuse the jury.

Several of the instructions given were objected to, because they submitted to the jury the question, whether or not after the defendant knew or ought to have known of Mr. Vaughan's peril, it exercised due care to avoid injuring him, when there was no evidence upon which to base them.

As we have seen in considering the facts of the case, it was not shown that the defendant knew or ought to have known that the plaintiff's intestate was in peril before he fell or was thrown from his bicycle, or that anything more could have been done after his fall than was done to avoid the accident. No instruction ought, therefore, to have been given submitting that question to the jury.

Instruction No. 5 was objected to, and the objection ought to have been sustained, because the instruction is ambiguous and if construed to mean that the defendant owed the plaintiff's intestate, as a trespasser, any higher degree of duty under the facts of the case than to exercise ordinary care not to injure him after it knew of his peril, it is erroneous.

There are other assignments of error, but as they are not likely to arise upon the next trial, if there should be another trial, it will be unnecessary to consider them.

The judgment to which this writ of error was awarded must be reversed, the verdict of the jury set aside and a new trial awarded, to be had not in conflict with the views expressed in this opinion.

Reversed.

Syllabus.

Wytheville.

VIRGINIA PASSENGER & POWER CO. v. FISHER AND OTHERS.

June 15, 1905.

Absent, Cardwell, J.

1. **APPEAL AND ERROR—Appointment of Receiver—Change of Possession of Property.**—An appeal lies from a decree appointing a receiver whereby a change in the possession or control of property is required; and, where the property is in the hands of receivers of another court, a direction to the receiver to intervene in that court and apply for the possession, and to take and receive the property from the receivers of that court is a sufficient change in possession and control to warrant an appeal to this court.
2. **APPEAL AND ERROR—What Reviewable.**—When a case is properly before this court on appeal from a decree appointing a receiver, all decrees and proceedings in the case are subject to consideration and review.
3. **CORPORATIONS—Diverting Assets—Suit by Stockholder.**—In order for a stockholder to maintain a suit in equity upon a cause of action existing in the corporation he must allege and prove a request or demand upon the directors, or other governing body of the corporation, or upon the stockholders where that is feasible, to institute proceedings against the wrong-doers, and their refusal after reasonable demand or request, or he must allege such facts in his pleadings as will show that it is reasonably certain that a demand for corporate action would have been useless. The fact that the wrong-doers own a controlling interest in the stock is a sufficient reason for not applying to them for redress, but is not a sufficient reason for failure to apply to the directors elected by them.
4. **CORPORATIONS—Wrong Doing—Collusion of Directors—Fraud—How Charged.**—An allegation that directors are colluding with wrong-doers and will not discharge their duties is the mere expression of an opinion or conclusion. Such an allegation is a charge of fraud, and to be made the basis of relief the facts out of which the fraud arises must be alleged and proved. It is not sufficient to state the conclusion without giving the facts upon which it is based.
5. **RAILROAD MORTGAGES—Suits Affecting—Parties.**—Railroad mortgages are a peculiar class of securities in which the trustee, expressly or impli-

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edly, represents the bondholders, and it is his duty to enforce their rights and to protect their interests under the trust. He is the proper party to bring a suit for the foreclosure of such mortgage deed, or to protect or to recover the mortgage property, and a bondholder cannot bring such suit unless the trustee has been requested to do so, and has refused or neglected so to do within a reasonable time, or is in a position where he is unable to act.

6. *EQUITY—Suit by Unsecured Creditor*—A general creditor cannot file a bill in equity to enforce a claim against a living person, or a corporation which is a going concern, unless he has first obtained a lien upon property, except where otherwise provided by statute.

Appeal from a decree of the Hustings Court of the city of Petersburg in a suit in chancery. Decree for complainants. Defendants appeal.

Reversed.

The opinion states the case.

Miles M. Martin, Christian & Christian and Munford, Hunton, Williams & Anderson, for the appellants.

Alex. Hamilton, Wm. B. McIlwaine, L. L. Lewis and Richard B. Davis, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

The appellees, George E. Fisher, Charles Hall Davis and Philip Rogers filed their bill in the Hustings Court of the city of Petersburg against the Virginia Passenger and Power Company, the Charlotte and Prince Edward Electric Railway and Improvement Company, Frank Jay Gould, Helen Miller Gould and William Northrop, trustee, in which they sue for themselves and all others who are stockholders, or bondholders, or creditors, of the Virginia Passenger and Power Company who may come in and contribute to the costs of the suit. The number of shares of stock and the face value of the bonds which they own, respectively, is set out in the bill.

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"The main purpose of the suit," as stated by the trial court, whose opinion is filed with the record, "is the appointment of a receiver to take charge of the property, rights, assets and franchises of said Virginia Passenger & Power Company, and operate the same under the direction of this court until the debts outstanding against said company, with their dignities and priorities, have been established; and for a sale of said property, rights, and franchises under the direction of this court, and the proceeds applied to the payment of the debts of said company in the order of their priorities as so established.

"Incident to said relief, the complainants pray that the defendants be enjoined, until the further order of this court, namely:

"1. Frank Jay Gould and Helen Miller Gould from disposing of the shares of stock and bonds of the Virginia Passenger & Power Company acquired by them under a certain agreement, bearing date December 23, 1902, commonly known as the 'Adjustment Agreement.'

"2. Frank Jay Gould and the Charlotte & Prince Edward Electric Railway & Improvement Company from disposing of the notes or other evidences of debt executed by the Virginia Passenger & Power Company in connection with the purchase of the Richmond & Petersburg Electric Railway Company, or of the said stock and bonds which are claimed to be held by them as collateral security for said notes or other evidences of debt.

"3. William Northrop, trustee, from selling or otherwise transferring to the Charlotte & Prince Edward Electric Railway & Improvement Company, or to any other person or corporation, any of the lands abutting upon the Appomattox river necessary for the development of the water power of said river, now held by him as such trustee."

The defendants demurred to and answered the bill. Upon the hearing of the cause, upon the motion of the complainants for the appointment of a receiver, and for injunctions as prayed for upon the pleadings, exhibits and affidavits filed, the

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Court overruled the demurrer and appointed a receiver of all of the assets and property of the Virginia Passenger and Power Company, and directed him to hold the same as the officer, and under the direction, of the court. From that decree this appeal was allowed.

The first question to be considered is the motion of the appellees to dismiss the appeal as improvidently awarded, because that decree was not an appealable decree under the provisions of section 3454 of the Code.

It is well settled that an appeal lies from a decree appointing a receiver whereby a change in the possession or control of the property is required. *Smith v. Butcher*, 28 Gratt. 144; *Shannon v. Hanks*, 88 Va. 338, 13 S. E. 437; *Deckert v. Chesapeake Western Co.*, 101 Va. 804, 45 S. E. 799.

It is insisted by the appellees that the decree appealed from does not on its face require the receiver to take possession of any property, nor does it require any one to deliver property to him.

At the time the receiver was appointed, the property of the Virginia Passenger and Power Company was in the hands of receivers of the Circuit Court of the United States for the Eastern District of Virginia, appointed in the case of the *Bowling Green Trust Company, trustee, against Virginia Passenger and Power Company, and others*, instituted after this suit was brought and the motion made for the appointment of a receiver in the Hustings Court. In appointing a receiver in this case, the Hustings Court proceeded upon the theory, as is apparent from its decree, that the proceedings therein had given it jurisdiction of the subject matter of the suit and the parties to it, before the suit in the Federal court was instituted, and that as soon as the facts were properly brought to the attention of that court, it would, out of regard to that comity which exists and must exist between the State and Federal courts in such cases, if there is to be an orderly administration of justice, dismiss its receivers. 2 *Cook on Stockholders* (3rd Ed.), sec. 839, and notes.

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Acting upon this view, the Hastings Court appointed its receiver, and directed him to intervene by petition or other proper proceeding in the cause of the *Bowling Green Trust Company v. Virginia Passenger and Power Company, &c.*, and request that court to vacate its order appointing receivers for the property in question, and direct them to turn over and deliver the property held by them to the receiver of the Hastings Court. And he was authorized and directed to take and receive from the receivers of that court the possession of all the property of the Virginia Passenger and Power Company, wherever situated, and generally to conduct all its business as a common carrier of passengers and freight, and to discharge all of the other public and private duties of that company. No further or other order was necessary on the part of the Hastings Court to authorize its receiver to take possession of the property when the Federal court surrendered possession of it, as it might have done but for the fact that this appeal and supersedeas was granted before application was made to that court by the receiver as directed.

We are of opinion, therefore, that the decree appointing the receiver in this case is an appealable decree, and that the motion to dismiss the appeal as improvidently awarded must be overruled.

The case being properly before this court upon appeal, all decrees and proceedings therein are subject to consideration and review. *Deckert v. Chesapeake Western Co., &c., supra.*

The action of the Hastings Court in overruling the demurrers to the bill is assigned as error.

One of the grounds of demurrer is that the complainants sue as stockholders of the Virginia Passenger and Power Company, but do not allege facts which show their right to maintain the suit in the capacity of stockholders.

It is not insisted that the complainants, as stockholders, have any right of action against the corporation of which they are members, but their claim is that they are suing as stockholders for the benefit of the corporation to redress its wrongs and to enforce its rights.

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Under what circumstances a stockholder in a corporation may bring a suit in a court of equity upon a cause of action existing in the corporation, has been recently considered by this court in the case of *Mount v. Radford Trust Co.*, 93 Va. 427, 431, 25 S. E. 244. The conclusion reached in that case was, that in order for a stockholder to maintain such a suit he must allege and prove that a request or demand has been made upon the board of directors, or other body managing the corporation, to institute proceedings against the wrongdoers, and their refusal to do so after reasonable request or demand; or he must allege such facts in his pleading as will show that it is reasonably certain that a demand for corporate action would have been useless. This conclusion is sustained by the great weight of authority, and its correctness is not controverted by the appellees, as we understand their written and oral arguments. *Foss v. Harbottle*, 2 Hare 461, 493; *Hawes v. Oakland*, 104 U. S., 450, 26 L. Ed., 827; 2 *Pomeroy's Eq. Jur.*, sec. 1095; *Morawetz on Corp.* (2nd Ed.), secs. 239, 240; 2 *Cook on Stockholders* (4th Ed.), secs. 740, 741, and cases cited.

While a stockholder may maintain a suit where the cause of action is in the corporation without a request to the directors or managing body to institute suit, it can only be done under exceptional circumstances. The rule is stated by Mr. Justice Miller as follows, in *Hawes v. Oakland*, *supra*: "The plaintiff should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders, as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it."

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In the case of *Tuscaloosa Mfg. Co., &c. v. Cox, &c.*, 69 Ala. 71, it was held that where the interests of the corporation are suffering, or are likely to suffer, through the inefficiency or faithlessness of any agent or official, an appeal for redress should be made to the board of directors or other governing body; and on their failure or refusal to act, the next redress in ordinary cases will be found in the power of the ballot, under the charter and by-laws of the corporation; and though there may be cases in which the stockholder may invoke the restraining power of a court of equity in the first instance, it must be a very strong case, showing that an appeal to the board of directors would be of no avail, and delay extremely perilous.

The supreme judicial court of Massachusetts, in discussing this question in *Dunphy v. Travelers' Newspaper Association*, 146 Mass. 495, 497-8, 16 N. E. 426, 431, says: "Even where their (the officers) acts are *ultra vires* or otherwise illegal, a complaining member must first seek his remedy with the corporation. The only exception to the rule, that a stockholder must apply to the directors, and also if need be to the corporation for redress of a wrong done it, before he can sue in a court of equity for himself and on behalf of other stockholders, is where it appears that such application would be unavailing to protect his rights." See *Flynn v. Brooklyn, &c. R. R. Co.*, 158 N. Y. 493, 53 N. E. 520; *Boyd v. Sims*, 87 Tenn. 771, 11 S. W. 948; *Rathbone v. Gas Co.*, 31 West Va. 798, 8 S. E. 570; *Moore v. Silver Valley Mining Co.*, 104 N. C. 534, 10 S. E. 679; *Foss v. Harbottle*, 2 Hare 461, 493; *Gray v. Lewis*, L. R. 8 Ch. App. 1050.

The bill in this case contains no allegation that the directors had been requested to remedy the wrongs complained of by suit or otherwise. Having failed to make or allege such request, the next question is, Does the bill allege such a state of facts as shows that redress was not attainable through the action of the corporation? The material statements of the bill upon this question are in substance as follows: It is alleged that a ma-

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jority of the stock of the corporation is owned by Frank Jay Gould and his sister, Miss Gould, who are charged, particularly the brother, with the wrongs complained of; that by virtue of the said controlling interest in the capital stock of the Virginia Passenger and Power Company, transferred to him by the adjustment agreement of December 23, 1902, he has since that time continued in office as directors of that company all or nearly all of the directors who were then in office, and who recommended and advised or approved the execution of that agreement, whereby he was given absolute control and management of both the Virginia Passenger and Power Company and the Atlantic Development Company, and has added to the directors in the first named company, in addition to the old directors retained by him, himself and two of his brothers, and also certain other persons who are holding offices or positions of trust in some of the numerous corporations controlled by him or his brothers, and many of whom have their offices or places of business in the same building with him; that since he has assumed control of the said company he has personally dictated and controlled all its acts and doings; that the board of directors, elected and continued by him in office, are and always have been subservient to his wishes, and have in effect colluded with him in the acts of spoliation committed by him on the property and assets of the said company; that the officers, directors and servants of the company are now, and have been since the 23rd day of December, 1903, wholly subservient to his will and wishes, and that he has personally directed, controlled, and carried into effect all the acts of the company complained of; that since the 23rd day of December, 1903, when he assumed absolute control of the company, the complainants have sought in various ways to get from officers of the company information as to its action and its financial condition, and in reference to the transfer of its bonds to the said Frank Jay Gould, and its general management by him, and have both at general meetings of the stockholders, and at the general office of the company in the

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city of Richmond, asked for and sought such information, but the complainants, both at the stockholders' meeting, in which the said Frank Jay Gould has a large majority of the stock, and by the employees of the company at its offices in Richmond, who are under his domination, have been refused any and all evidence or information with reference to the said matters; that the complainants have sought from the officers of the company at its office in Richmond, and at stockholders' meetings, information with reference to the operation and condition of the company, but all information in reference to its affairs has been refused by its officers and directors at its office in Richmond, and also at its stockholders' meetings, where the complainants have propounded questions and sought information which has been uniformly and in every case refused them.

The averments of the bill, that Frank Jay Gould, the alleged wrongdoer, has since December, 1903, controlled a majority of the stock of the company, state a sufficient reason, we think, for not applying to the corporation, at a meeting of its stockholders, for action to redress the wrongs complained of. An application to the stockholders for corporate action under the facts alleged would have been a vain and useless undertaking. *Dunphy v. Travelers, &c. Asso.*, 146 Mass. 495, 498, 16 N. E. 426; *Decatur Mineral Co. v. Palm*; 113 Ala. 532, 540, 21 South. 315, 59 Am. St. 140.

But the fact that he controlled a majority of the stock and had elected to, and continued in, office the board of directors, did not relieve the complaining stockholders from applying to the directors, unless the other circumstances averred relieved them from that duty. *Dunphy v. Travelers, &c. Asso.*, *supra*; *Decatur Min. Co. v. Palm*, *supra*.

The complainants do not allege who or how many directors there were when this suit was brought. There is an exhibit filed with the bill which shows that for the year ending December 31, 1903, the board consisted of nine members. How many of these were old and how many were new directors is not shown.

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What offices or positions of trust the new directors held under Frank Jay Gould, which would have prevented them from faithfully performing their duties as directors are not stated. The fact that the old directors recommended, advised, or approved the agreement by which Frank Jay Gould and his sister obtained a majority of the stock of the company and to that extent control of it, is no ground for presuming that they would not perform their duty, since the complainants themselves were parties to and signed that agreement.

The allegation that the directors have always been subservient to his wishes and have, in effect, colluded with him in the acts of spoliation charged to have been committed by him on the property and assets of the company, and that they are wholly subservient to his will and wishes, are not averments of fact but the conclusions of the complainants, based upon facts which are not alleged, and upon which, if alleged, the court might draw different conclusions. None of the directors except Frank Jay Gould are charged with deriving any benefit from his alleged wrongdoing, or made parties to the suit.

In the case of *Brewer v. Boston Theatre, &c.*, 104 Mass. 378, 388-9, the allegations as to the subserviency of the directors to the wrongdoers, the latter's control over them, and their faithlessness, were as marked as in this suit. In that case it was alleged that the directors "have allowed themselves to become little less than the creatures of Tompkins and Thayer" (the wrongdoers), "and registers of their wishes, and have come to consider that no duty rested or now rests upon them as directors to do more or other than to make said corporation and the property of the plaintiffs therein invested, serviceable to Tompkins and Thayer." That phraseology, said that court, "does not comport with the distinctness and certainty required of legal averments; and we do not think that any process of elimination would deduce from it the proposition that the present directors of the corporation are so hostile to its interests and to any judicial proceedings for their protection, as to make proceedings in

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this forum necessary." Again, in discussing the allegation, "that a majority of the present board of directors of said defendant corporation are acting in the interest of and are under the control of said Tompkins and Thayer," that court said: "But this does not show that they are wholly disregarding of the interests of the corporation; or that they would so act if informed of the injurious effect of their action; or that they would yield to the influence of Tompkins and Thayer if aware of the purpose and uses for which that influence is exerted. It is not equivalent to a request and a refusal of the use of the corporate name and authority for the redress of the wrongs complained of; nor does it show that such an application upon a suitable representation of facts would be unavailing."

In the case of *Steiner, &c. v. Parsons*, 103 Ala. 215, 222, 13 South. 771, 774, where a bill was filed by a stockholder of a corporation to have redressed alleged corporate wrongs, without having made a request of the managing body of the corporation to have the grievances complained of corrected, it was held that the complainant must aver in his bill the facts constituting his excuse for not making such request, with particularity and definiteness. The averment of conclusions will not suffice. "The facts," said the court, "upon which such averments of conclusions rest should have been set out, so that the court might judge intelligently for itself—as it is its high duty to do in such cases—whether the plaintiff had the right to proceed to file the bill in his name or not. The particularity of averment to be observed in such cases has received extended discussion in adjudged cases, there being scarcely anything to be added on the subject." *Hawes v. Oakland*, *supra*; *Dunphy v. Travelers, &c. Asso.*, *supra*; *L. & N. R. R. Co. v. Neal* (Ala.), 29 South. 865; *Mount v. Radford*, *supra*; *Boyd v. Sims*, *supra*; 2 *Cook on Corp.* (4th Ed.), sec. 741.

The allegation that a board of directors is colluding with the

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wrongdoers; and that it will not perform its duty, or would fail to discharge its trust, is a charge of fraud, and fraud being a conclusion of law from facts, it is a well settled rule of pleading, both at law and in equity, that the facts out of which the fraud arises must be alleged as well as proved to justify relief on that ground. *Steiner v. Parsons, supra; Southall, &c. v. Parrish, &c.*, 85 Va. 403, 410, 7 S. E. 534, 1 L. R. A. 641.

The allegations of the bill do not show that any of the directors except Frank Jay Gould would be benefitted by the grievances complained of. Directors generally are, and always ought to be, stockholders in the corporation whose business they have charge of, and it is to their interest to conduct its affairs properly, and to discharge their trust faithfully. In the absence of causes which may influence them otherwise, the presumption is that they would do their duty, and this presumption is greatly strengthened when the effect of the duty would be to promote their own interests. *Porter v. Pittsburg, &c. Co.*, 120 U. S. 670, 7 Sup. Ct. 741, 30 L. Ed. 830; *Decatur, &c. Co. v. Palm*, 113 Ala. 531, 539, 21 South. 315, 59 Am. St. 140.

Without discussing further the allegations of the bill relied on to excuse the complaining stockholders from requesting the board of directors to redress the wrongs complained of, we are of opinion that under the rules of law governing this class of cases the bill does not allege such facts as show with reasonable certainty that the board of directors would have refused to remedy the wrongs complained of, or to bring a suit for that purpose, and that a request, or a demand upon them, to sue would, therefore, have been useless.

Another ground of demurrer to the bill is that the complainants have not alleged facts which show a right in them to maintain this suit in the capacity of bondholders.

The contention of the appellants is that the trustee in a railroad corporation mortgage is the proper party and the only proper party to bring a suit for the foreclosure of the mortgage, or to protect or recover the property of the corporation subject

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to, or which should be subject to the lien of the mortgage; and that a bondholder cannot bring such suit unless the trustee has been requested so to do and has declined, or is in a position in which he is unable to act.

The general rule is that in suits respecting trust property, brought either by or against the trustees, the *cestui que trust* as well as the trustees are necessary parties" (*Story's Eq. Pl.*, sec. 207), and this has been the rule generally followed in this State. To this rule, however, there are exceptions. *Story's Eq. Pl.*, 21 (6th Ed.), 207a; *Carey v. Brown*, 92 U. S. 171, 23 L. Ed. 469; *Buck v. Pennybacker's Ex.*, 4 Leigh. 5.

In the last cited case, it was held that the beneficiaries were unnecessary parties since the trustee in that case represented their interests.

In *Carey v. Brown*, *supra*, it was held that where the suit is brought by the trustee to recover the trust property or to reduce it into possession and in no wise affects his relations with the *cestui que trust*, it is unnecessary to make the latter parties.

In *Short's Law of Railway Bonds and Mortgages*, sec. 483, it is said: "One of the exceptions to the general rule is in relation to railroad mortgages. The exception in that class of cases, he states, "may almost be said to overshadow the rule itself. The doctrine now universally accepted is, that the trustee is, in the absence of some special consideration, the only necessary party in suits to enforce or defend the rights of bondholders. This doctrine may be referred to two principles: (1) The bondholders usually constitute a numerous class having a common interest, and therefore suits by or against them fall into the category of those in which appearance by representation is permissible; (2) The nature of the contract is such that the bondholders, in purchasing their securities, may reasonably be assumed to have agreed that the trustee should, under ordinary circumstances, be that representative." Again, in section 485, in discussing the question, in what suits the trustee is the proper party plaintiff, he says: "From the above principle it follows that,

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under ordinary circumstances the trustees are the proper parties to institute a suit for the foreclosure of the mortgage; or to maintain and defend the trust fund against wrongful attack or injury tending to impair its safety or amount; or to apply for an injunction to restrain an alleged illegal proceeding which will injure the value of the bonds and cast a cloud upon the security; or to bring suit to have a controverted priority or lien settled before irredeemable sale is made under another mortgage which is claimed to rank above the one made to the petitioners; or to secure from the company an accounting where it has neglected to apply earnings to the mortgage debt." And in section 462 it is said, that while the interposition of a trustee in the mortgage does not limit in any degree the abstract right of the bondholders to institute proceedings to foreclose, "it modifies the remedial procedure for its enforcement to the extent that the bondholders are not allowed to take any active steps in initiating a foreclosure suit unless they show that the trustee has refused to bring the suit, or is for some reason an improper person to represent their interests."

Judge Thompson, in his work on Corporations, vol. 5, sec. 6210, says, that "The position of *bondholders*, as beneficiaries under the trust expressed in the mortgage deed of trust, is somewhat analogous to that of *stockholders*, in respect of their rights of action to redress grievances arising in the management of the affairs of the corporation. Ordinarily such bondholders have no right to bring an action to foreclose the mortgage; but the trustee in the mortgage, as stated in the preceding section, is the proper person to sue. But if he neglects to sue after the happening of the condition which entitles the bondholders to a foreclosure, and after being requested by them so to do, they may bring the action to foreclose, making him a party defendant."

The rule on the subject, as stated in *Cook on Stockholders* (4th Ed.), vol. 3, sec. 826, is, that "The proper person to foreclose is the trustee to whom the deed of trust runs. Unless he refuses or neglects to perform his duty, his *cestui que trust*, the

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bondholders, have no standing in court. Hence the bondholder must, in good faith, place the matter before the trustee and ask him to commence the suit. If then he refuse or decline to do so, the bondholder may sue. But the bondholder in his bill of complaint must allege the request to the trustee, and the refusal or neglect of the trustee to act." And in sec. 830, the same author says: "In addition to bondholders' suits to foreclose the mortgage when the trustee refuses to do so, the bondholder may bring suit to protect the property where there is imminent danger to it and the trustee refuses to bring suit."

In 1 *Morawetz on Corp.*, sec. 239, it is said, that "It is a general rule founded on *convenience* and the implied agreement of the parties, that where a trustee is invested with active duties and represents numerous beneficiaries, no portion of the beneficiaries are entitled to bring suit for the protection of the trust, unless the trustee has refused, or is unable to take the necessary steps to protect it on their behalf."

The doctrine stated by the text-writers quoted is based upon, or grows out of, several considerations. The peculiar character of the security (*Shaw v. Railroad Co.*, 100 U. S. 605, 25 L. Ed. 757); the fact that the trustees are parties to the mortgage contract, negotiating its terms and stipulations, to whom the usual rights and powers of mortgagees are reserved, and the usual obligation of mortgagors are made (*Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179); that the debt secured generally consists of a large number of bonds which pass frequently from hand to hand, and are owned by many persons (3 *Cook on Corp.*, sec. 819); that generally all the rights the bondholders have or ever had in the mortgage, legal or equitable, they get through the trustees to whom the conveyance was made for their security (*Richter v. Jerome*, 123 U. S. 233, 246, 8 Sup. Ct. 106, 31 L. Ed. 132); the relation which the bondholders bear to each other, their bonds generally being of the same class and issued at the same time (*Shaw v. Railroad, supra*); the fact that the trust is not a dry, naked agency, but is coupled with

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important duties in caring for the trust subject, as well as instituting foreclosure proceedings where necessary (3 *Cook on Stockholders*, sec. 815); the difficulty, if not the impossibility, of bringing all the bondholders before the court, and the injurious delays which may result from endeavoring to do so (*Story's Eq. Pl.*, sec. 97; 3 *Cook on Stockholders*, sec. 821); and the fact that by the terms, expressly or impliedly, of the mortgage itself the trustee generally is made the representative of all the bondholders (3 *Cook on Stockholders*, sec. 821). See *Coal Co. v. Blatchford*, 172 Wall. 172, 178, 20 L. Ed. 179; *Carey v. Brown*, 92 U. S. 171, 23 L. Ed. 469; *Kerrison v. Stewart*, 93 U. S. 155, 160-1, 23 L. Ed. 843; *Shaw v. Railroad Co.*, 100 U. S. 605, 25 L. Ed. 757; *Belfield v. Taylor*, 12 Cond. Eng. Chy. Rep. 93; *McFadden v. Mays Co.*, 49 N. J. Eq. 176, 22 Atl. 932; *Falmouth Nat. Bank v. Cape Cod Co.*, 166 Mass. 550, 44 N. E. 617; *Mergen v. Kansas, &c. Co.*, 15 Fed. Rep. 55; *General Elec. Co. v. La Grande*, 87 Fed. 590; *Consolidated Water Co. v. City of San Diego*, 89 Fed. 272.

The question now under consideration has never been passed upon by this court, so far as we know. The suit of *Gibert v. Washington, &c. R. Co.*, 33 Gratt. 586, was brought by bondholders under a railroad mortgage deed for the purpose of foreclosing the mortgages under which they were secured, and they were foreclosed in that suit. This, it is claimed by the appellees, must be regarded as a decision, by implication at least, that the suit was properly brought. Not only was no question made in that case as to the right of the bondholders to bring the suit, but their bill alleged that according to the terms of the several mortgage deeds the beneficiaries thereunder were entitled to foreclose the same (page 589). Under the allegations of the bill the bondholders had the right to sue, and as their right was not questioned that case cannot be regarded as adjudicating a question not raised, and so far as the record shows not in the mind of the court.

In *Osborne v. Big Stone Gap Colliery Co.*, 96 Va. 58, 30

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S. E. 446, also relied on by the appellees, in which it was held that the trustee did not represent the creditors; the deed of trust was the ordinary deed of trust to secure certain creditors, and, there being nothing in the character of the trust to show that the trustee had the right to or could have represented all the creditors secured by it, it came within the general rule that in suits respecting the trust property brought either by or against the trustees, the beneficiaries as well as the trustees are necessary parties.

But as before stated, railroad mortgages are not like the ordinary deeds of trust, but are a peculiar class of securities in which the trustee, expressly or impliedly, represents the bondholders, and it is his duty to enforce their rights and to protect their interests under the trust. This being so, it seems to us that the rule that the proper party to bring a suit for the foreclosure of such mortgage deed, or to protect or recover the property of the corporation subject to, or which should be made subject to, the lien of the mortgage, is the trustee, and that a bondholder should not be permitted to bring such suit unless the trustee has been requested to do so and has refused or neglected to do so within a reasonable time, or he is in a position where he is unable to act. Such a rule does not deprive the bondholders of any right or remedy, but merely imposes conditions upon them in the exercise of their rights and remedies well adapted to the protection of the rights of those interested in such securities, without subjecting bondholders to unnecessary inconvenience.

Courts of equity are swift to protect such minority bondholders from oppression and wrong, but it is no hardship upon them to require that they shall allege and prove such facts as show that they cannot get the relief desired through their representative, the trustee, and that their suit is necessary for their protection.

So far we have been considering the question without reference to the special provisions contained in the mortgage deed

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under which the complainants claim. This deed, when all of its provisions are considered together, as they must be (*Potomac Mfg. Co. v. Evans*, 84 Va. 717, 720, 6 S. E. 2), clearly shows that the trustee therein was clothed with all necessary authority to assert and protect the rights of the bondholders secured thereby, and that it was made the duty of such trustee to do so. It further provides that the bondholders shall not institute any suit or proceeding for a foreclosure of the mortgage deed, or for the execution of the trusts under it, or for the appointment of a receiver, until after written notice has been given to the trustee of the default complained of, and a written request made to the trustee to exercise its powers, or to institute suit in its own name to assert the right or remedy the wrong in question. The provision in the mortgage deed, that a majority in amount of the holders of bonds shall unite in such request to the trustee before any of them can bring suit to protect rights or remedy wrongs which the trustee refuses or neglects to assert or remedy, need not be considered in this case, as there is no allegation that the complainants gave any such notice or made any such request.

The complainants having failed in their bill to aver that they had brought their grievances to the attention of the trustee and requested it to sue, or to set out such a state of facts as would show that the trustee was in such a position that it was unable to act, we are of opinion that the bill was demurrable on that ground.

Another ground of demurrer is that the complainants do not allege facts which show a right on their part to maintain this suit in the capacity of creditors.

The complainants sue in the capacity of general creditors, as well as of stockholders and bondholders, but they do not allege any indebtedness other than as bondholders, nor any indebtedness which was then due and unpaid. It is well settled

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that a general creditor cannot file a bill in equity to enforce a claim against a living person or a corporation which is a going concern, unless he has first obtained a lien upon the property, except where otherwise provided by statute. *Rhodes v. Cousins*, 6 Rand. 188, 18 Am. Dec. 715; *Wallace v. Treacle*, 27 Grat. 479, 486; *Nunnally v. Straus*, 94 Va. 255, 260-1, 26 S. E. 580; *Hollins v. Briarfield*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113.

We are of opinion, therefore, that the bill of appellees does not show that they had the right to maintain this suit, either as stockholders, bondholders, or general creditors, and, not being entitled to maintain the suit the court erred in appointing a receiver.

Without considering the other grounds of demurrer, we are of opinion that the decree complained of must be reversed and set aside, and the cause remanded to the Hustings Court for such further proceedings as the appellants may be advised to take, not inconsistent with the views expressed in this opinion, and in accordance with law.

Reversed.

Statement.

Wytheville.**LAWLER AND OTHERS V. FRENCH AND OTHERS.**

June 15, 1905.

1. **VENDOR AND PURCHASER—Sale by Trustee—Suit to Set Aside—Case in Judgment.**—Upon the evidence in this cause it is held that the sale made by trustees, which was set aside by the trial court, is a valid sale. The trustees had authority to sell, the property was duly advertised, there was no collusion between the trustees and the purchaser, the price obtained was not so inadequate as to justify the court in setting it aside on that ground, and the grantor in the deed of trust practically ratified the sale after it was made by assigning the surplus purchase money to a third person.
2. **APPEAL AND ERROR—Objections Not Made Below.**—Objection that a trustee in a deed of trust was not authorized to sell because he had not been requested in writing to sell, as required by the deed of trust, or that the deed of trust was in fact a mortgage, because the trustee was interested in the debt secured, cannot be made in this court for the first time.

Appeal from a decree of the Corporation Court of the city of Alexandria in a suit in chancery. Decree for complainant. Defendants appeal.

Reversed.

The opinion states the case.

Norton & Boothe, Douglas Stuart and M. J. Calvert, for the appellants.

C. C. Carlin and Edmund Burke, for the appellees.

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BUCHANAN, J., delivered the opinion of the court.

The object of this suit was to enjoin the appellant, Lawler, from prosecuting an action of unlawful detainer to recover the possession of a house and lot purchased by him from the trustees in a deed of trust, executed to secure the payment of money loaned or advanced by a building and loan association to Robert W. French, one of its members, together with the dues and premiums on the borrower's stock, fines for the non-payment of such dues and premiums, and all taxes and assessments on the trust property during the continuance of the advancement; to set aside the sale and conveyance made by the trustees; and to have an accounting between the association and the borrowing member. The court upon the hearing of the cause granted the relief prayed for, and from that decree this appeal was allowed.

The grounds stated in the bill for having the sale and conveyance made by the trustees set aside are: (1) That at the time of the sale the complainant was not three months in arrears in the payment of dues, fines, interest or instalments payable to the association; (2) that the sale was ordered without notice to him or demand upon him for the payment of any dues, fines or interest, and was in fraud of his rights and contrary to the covenants and terms of the deed of trust; (3) that there were only four persons present at the sale besides the inmates of his house; (4) that his sister-in-law was present at the sale and instructed and directed a friend who was near her to make a bid in excess of the price at which the property was knocked off, which she thought had been communicated to the auctioneer, but by some mistake or misunderstanding was not cried; (5) that the price at which the house and lot were sold was grossly inadequate, and a fraud upon the complainant's rights, as the property was worth more than double the amount for which it was sold; (6) that the complainant believes and charges that there was fraud and collusion between the purchaser and the trustees, both conniving at the sale at small figures, and although

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the complainant protested against the sale and offered to reimburse the purchaser, he declined to accept the money he paid for the property and that the whole transaction, so far as the purchaser and the trustees were concerned, was concluded in less than two days after the sale.

The trustees and purchaser demurred to and answered the bill. In their answers they deny all the material allegations relied on as grounds for setting aside the sale and conveyance except the statement in the bill that the complainant was not three months in arrears on his monthly dues, fines, interest or instalments. While the answers of the trustees admit that the complainant was not three months in arrears on account of his dues, etc., they aver that he had not paid the taxes upon the property for several years, and that immediately prior to advertising the property for sale by the trustees the building association had been required to pay and did pay the said taxes and assessments, amounting to the sum of \$398.54, which the complainant, although often requested, had refused to refund. The trustees further state in their answer that after the sale and conveyance sought to be set aside the said French had ratified the sale by giving an order upon them for the balance of the proceeds of sale after satisfying the debt secured by the trust deed, and that they paid over the same to the assignee and had settled their accounts before the commissioner of accounts.

The complainant failed to prove the material allegations of his bill. There is not the slightest evidence of fraud or collusion on the part of the trustees and the purchaser. Although there were but few persons present at the sale, it was advertised in the manner prescribed by the trust deed in a newspaper of the city, of large circulation. The auctioneer bid on the property for the association a sum in excess of its debt, which was more than another person who had gone there to bid was willing to give for it. It was sold to the purchaser, Lawler, as the highest and best bidder. There was nothing in the condition of the weather to prevent persons from attending the sale, so far as

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the record shows. While the proof shows that the house and lot cost much more than they were sold for, it further appears that their location is a very undesirable one, and that such residential property in that part of the city does not sell for anything like its original cost. It is by no means clear that the property, if offered for sale again would sell for much, if any, more than the price at which it did sell—at least there is no such inadequacy of price shown as would justify the court in setting aside the sale on that ground.

The clear preponderance of evidence is that the sister-in-law of the appellee, French, who was present at the sale, did not bid or authorize any one else to bid for her.

The allegation of the bill, that Mr. French, who was present at the sale, protested against the sale, is not only not sustained by the proof, but after the sale he assigned to a Mr. Andrews, one of his creditors, so much of his interest in the proceeds of the sale as was necessary to pay that creditor's debt. It is true that he and his assignee testify that the order on the trustees was not understood to be an assignment, but was given merely to secure the creditor, and that the paper was not intended to be a ratification of the sale. The conduct of both complainant and the assignee is in direct conflict with this contention, and in accordance with the plain provisions of the assignment, which was written by an attorney and acknowledged before a notary, for when the trustees, pursuant to the terms of the assignment, paid the money to the assignee he received it without any claim that the order did not entitle him to receive the money but was a mere security for the debt; and Mr. French himself, after the assignment had been given, made an effort to collect a part of the said proceeds from the trustees, and when shown his assignment to Mr. Andrews he said he had forgotten all about it.

The contention of Mr. French that the trustees in the deed of trust advertised and made sale of the property before there had been any breach of the bond for the money loaned, or the deed of trust securing the same, is not borne out by the record.

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By the terms of the trust the by-laws of the association of which the complainant was a member (art. IX, sec. 6) expressly provide that: "If any person who has received an advance neglects to pay interest, dues or monthly payments thereon for a period of three months from the time the same shall be due, or if he neglects to pay his insurance or taxes within ten days after they fall due, or to perform any condition or requirement contained in the obligation or security for such advance, then the whole principal mentioned in the mortgage, note or bond shall at once become due and payable without further notice, and proceedings may be commenced forthwith to foreclose said mortgage or to collect said bond or note, in such manner as the law directs, or as the board of directors may deem best for the interests of the association."

When the sale was advertised, the complainant had failed to pay his taxes for several years, and they had been paid by the association. This failure to pay his taxes was a violation of his contract with the association and gave it the right to have the property sold. The fact that the association had not earlier exercised that right was not a waiver of the right to have it sold for their non-payment.

Neither does the evidence sustain the contention that the association had agreed, when Mr. French paid up his other dues, to give him a longer time within which to pay his taxes than was given.

The appellee, French, asserts in his brief that the trustees made the sale without any request to them in writing by the building association and their sale was therefore an unlawful exercise of the powers conferred upon them by the deed of trust. He further contends in his brief that the conveyance under which the sale was made was in fact a mortgage and not a deed of trust, and that he is entitled to redeem the property. The ground upon which it is claimed that the conveyance is a mortgage, although in form a deed of trust, is that one of the trustees was a stockholder and an officer in the building association.

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Neither of these contentions were made in the bill and no facts alleged upon which they can be based. These questions not having been put in issue by the pleadings cannot be considered by the court.

Without discussing further the grounds relied on for the relief sought, it is sufficient to say that we are of opinion that the case made did not warrant the court in setting aside the sale. Its decree must, therefore, be reversed, the injunction dissolved, and the bill dismissed.

Reversed.

Statement.

Wytheville.

WILLIAMSON v. SOUTHERN RAILWAY COMPANY.

June 15, 1905.

Absent, Cardwell, J.

1. **RAILROADS—Walkways on Bridge—Invited Guests—Licensees.**—The fact that a railroad company builds a bridge for its own use across a river, with a walkway on each side of the tracks, and that persons so using the bridge, after landing, walk along the right-of-way of the railroad company in going to their homes or places of business, and have so used it for many years, with the knowledge of the company, does not constitute such persons the "invited guests" of the company while on said right of way, but mere licensees. This is especially true where danger signals have been conspicuously erected warning persons to keep off the tracks.
2. **ACTION FOR NEGLIGENCE.**—An action for negligence only lies where there has been a failure to perform some legal duty which the defendant owes to the party injured.
3. **RAILROADS—Duty to Licensees.**—A railroad company owes no duty of previous preparation for the protection of mere licensees. Its sole duty is to use reasonable care to discover and not to injure such persons when they may reasonably be expected to be on its tracks at a particular point. The obligation is not an absolute one, but it is only to use ordinary care for their protection, under conditions and circumstances as they actually exist at the time and place where the licensee may be reasonably expected.

Error to a judgment of the Law and Equity Court of the city of Richmond in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Opinion.

Meredith & Cocke, for the plaintiff in error.

Munford, Hunton, Williams & Anderson, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This is an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant company. The damages were assessed by the jury at \$1,500, subject to a demurrer to the evidence, which was sustained and judgment given for the defendant.

The accident which is the subject of inquiry occurred upon that portion of the main line of the defendant which runs along the south bank of James river, at or about its entry of the company's yards in the city of Manchester. A little northwest of the city of Manchester, in James river, is an island called "Belle Isle," upon which is located an iron manufactory. This island is connected with the south bank, or Manchester side, of the river by a railroad bridge built by the defendant company for its use in hauling freight, upon each side of which is provided a walkway for the use of persons going to and from the iron works. These iron works and the railroad bridge connecting them with the main line of the Southern Railway on the Manchester side of the river have been in operation for many years. When the employees from "Belle Isle" cross the bridge and reach the south bank of the river, they have two routes open to them—one leading away from the railroad and into the city of Manchester, and the other along the right of way of the defendant company into the city. These employees had for many years used both routes, the choice depending upon the point of destination in the city. Those who, for their convenience, adopted the latter route, had always enjoyed its use by the passive acquiescence of the defendant.

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The plaintiff had been for "three or four months" an employee of the iron works on "Belle Isle," and on the 27th day of November, 1903, he left the works fifteen minutes before six o'clock to go to his home. When he reached the south bank of the river he pursued, as was his regular habit, the route along the right of way of the defendant company. He walked on the pathway at the side of the track a distance of about fourteen hundred feet, but finding the path rough he looked and listened to ascertain if a train was approaching, and being satisfied that no train was coming, he stepped upon the railroad track and walked thereon for a distance of twenty-five yards, when he looked back and found a "work-train" of the defendant company so close upon him that he could not jump out of the way in time to avoid the injuries complained of. The plaintiff says that it was a very dark night; that the engine was provided with no headlight or lights of any description, and when he looked back it was so dark that he could not see the engine good. He further says that his hearing was poor in one ear, and that it was down-grade at that point, which caused the train to run without making much noise.

It is contended by the plaintiff in error that, when using the track and right of way of the railroad on the south side of the river as a convenient route to his home, he occupied a higher relation to the defendant company than that of licensee it being insisted that "the defendant so built its bridge, with walkways on each side thereof, that the workmen on 'Belle Isle' could come across to the Manchester side and use its tracks as their route to and from their homes; that no invitation in a practical way could have been more strongly given; that it is idle to say that the company only built the bridge to get the men to the shore, and that it never meant for them to use the tracks as their route home. The two things, the bridge and the route, were too closely connected for them to be separated with fairness. The old bridge and route had been used jointly for fifty years, and the new bridge and the route were intended and expected to be used jointly. The use was in fact by invitation."

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We have been unable to find any fact or circumstance in the record to support this contention. No relation is disclosed between the defendant and the iron works other than that of common carrier and shipper, and the defendant can hardly be held to have built its bridge from "Belle Isle" to the shore for the benefit of the workmen there employed. It was built for the use and the benefit of the railroad company in hauling freight. The construction of the walkways on each side of the bridge was a mere incident, and while put there for persons to walk on, they served as a proclamation and warning to such persons not to use the track rather than an invitation to use it. When those using the walkways on either side of the bridge reached the shore, they bore no relation whatever to the defendant company. They were uncontrolled and free to go where, when, and by whatsoever route they pleased. Such of them as chose to follow the right of way of the railroad as a convenient route to their homes, did so voluntarily and without invitation from the defendant company. On the contrary, two hundred and forty feet from where the plaintiff was struck there was a large sign four feet square, with the following warning thereon:

"DANGER—BEWARE."

"The public is notified that these railroad tracks and right of way are no thoroughfare; must be used by trains, and are dangerous for pedestrians who are warned to use the public streets and keep off these private tracks."

This warning is signed by the general manager of the defendant company. It is set up ten feet high and conspicuously in view of the plaintiff every time he passes over the right of way of the defendant in going to his home.

In the light of these facts, our conclusion is that the plaintiff was not using the railroad track on the evening of his injury as the "invited guest" of the defendant company, but was there as bare licensee.

An action for negligence only lies where there has been a failure to perform some legal duty which the defendant owes to the party injured.

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In the case at bar, the evidence shows that the right of way of the defendant company, at the point where the accident occurred, had been for many years in daily use, as a walkway, by persons from "Belle Isle," and that this use and the particular hours of such use were well known to the company and its employees. Under these circumstances it was the duty of the company to use reasonable care to discover and not to injure persons whom it might reasonably expect to be on its tracks at that point. *Blankenship v. C. & O. Ry. Co.*, 94 Va. 499, 27 S. E. 20; *C. & O. Ry. Co. v. Rogers*, 100 Va. 234, 41, S. E. 732.

In the case of *N. & W. Ry. Co. v. Wood*, 99 Va. 156, 37 S. E. 846, where the plaintiff was standing on the platform of a freight depot and was injured by a freight train that ran against the platform, this court said: "Being there as a mere licensee, the defendant did not owe him the duty of maintaining its road-bed, switches, and connected appliances in proper condition for running its trains, or of providing and using proper and safe trucks, couplings, and machinery on its cars or of properly inspecting the same; or of employing competent servants to manage its trains, or to run them at a safe and proper rate of speed. The general rule being that a bare licensee, that is, one who is permitted by the passive acquiescence of the railroad company to come upon its depot platform for his own purposes in no way connected with the railroad is only relieved from the responsibility of being a trespasser, and takes upon himself all the ordinary risks attached to the place and the business carried on there." Citing 2 *Shear & Red. on Neg.*, sec. 705; *Nichol's Admr. v. W. O., &c., R. Co.*, 83 Va. 102, 5 S. E. 171, 5 Am. St. 257; *Gillis v. Penn. R. R. Co.*, 59 Penn. St. 129, 98 Am. Dec. 317; *Holland, &c. v. Sparks*, 92 Ga. 753, 18 S. E. 990.

In the case of *C. & O. Ry. Co. v. Rogers*, *supra*, a case similar in its facts and circumstances to that under consideration, this court approved an instruction which told the jury, that the defendant company did not owe the plaintiff's intestate the duty of blowing its whistle, ringing its bell, running its engines at

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any particular rate of speed, or having a light on said engines or tender; that if they believed from the evidence that the servants of the defendant in charge of the engine could not, in the exercise of reasonable care under the circumstances surrounding them at the time, have known of the danger to the plaintiff's decedent in time to avoid the accident, they must find for the defendant. But that if they believed from the evidence that the servants of the defendant in charge of the engine could, in the exercise of reasonable care under the circumstances surrounding them at the time, by having a proper lookout, have discovered the danger of the plaintiff in time to avoid the accident, they must find for the plaintiff.

The result of these decisions is that a railroad company owes no duty of prevision to a bare licensee. It is under no obligation to make preparation in advance for his protection. Its sole duty is to use reasonable care to discover and not to injure such persons when they may reasonably be expected to be on its tracks at a particular point. As said in *Wood's case, supra*, such a person is only relieved from the responsibility of being a trespasser and takes upon himself all the ordinary risks attached to the place and the business carried on there. The uncontradicted evidence of the engineer in the present case is that he did keep a lookout and did not see the plaintiff, who, he says, must have been walking in the middle of the track, where he could not have seen him on account of a curve in the road at that point; that if the plaintiff had been on the side of the track at the edge of the ties, he could have seen him.

It is earnestly insisted that it was not intended, in the *Rogers case, supra*, to hold that a railroad company was without fault in running a train on a dark night with no light on its engine, thereby depriving itself of the power to keep such reasonable lookout as the law required; that the declaration in the *Rogers case* meant to charge that the failure to have proper lights on the engine was negligence in itself, without regard to whether or not they were necessary for the maintenance of a reasonable

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lookout; that the evidence bears out this view of the pleading, because it there appears that it was a bright moonlight night, and therefore immaterial whether or not there were lights on the engine; that it would be a strange and striking contradiction, if not a curious absurdity, to announce it to be the duty of a railroad company to keep a reasonable lookout and at the same time to hold that it could so envelope itself in darkness as to prevent its performance of such clearly stated duty.

The argument of the learned counsel on this point may be reduced to this proposition: that if it is a bright moonlight night the railroad may run its trains without lights on its engines, but if there is no moon, or the moon is obscured so as to make the night dark, it must, for the protection of bare licensees provide its engines with artificial lights, or be held guilty of a failure to perform a legal duty due to such licensees.

To maintain this view would destroy the established rule that a railroad company is under no duty to make previous preparation for the protection of mere licensees. For if they must provide lights for their protection on a dark night, it could with equal propriety be urged that on a down grade, which it is here contended so reduced the noise of the train as to destroy its value as notice, the company should be required to substitute other noises as notice of its approach. It could with equal force be contended that its machinery and appliances, other than lights, should be in order, that competent employees should be provided, and that the speed of its trains should be so regulated as to provide for the increased danger of a dark night to the licensees. Many things could be done which would add to the facility and safety with which bare licensees might, for their own convenience, use the private property of the railroad, but enough has been said to indicate how difficult, if not impossible, it would be to engraft upon the rule mentioned any exception without ignoring the property rights of the railroad company. There is no contradiction in the rule holding that the defendant company must keep a reasonable lookout to avoid injuring bare

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licensees and at the same time providing that it is under no obligation to furnish lights for its engines on a dark night for the protection of such persons. There is no obligation upon the defendant to do anything to make the conditions more favorable than the natural surroundings make them. The obligation is not an absolute one to discover the plaintiff, but it is only the duty of using ordinary care to keep a reasonable lookout under the conditions and circumstances existing at the time the point is reached where the licensee may be reasonably expected. This is shown by the instruction approved in the *Rogers case, supra*, which told the jury that if they believed from the evidence that the servants of the defendant in charge of the engine could not, in the exercise of reasonable care *under the circumstances surrounding them at the time*, have known of the danger to the plaintiff's decedent in time to have avoided the accident, they must find for the defendant.

In the case at bar, the defendant discharged its duty to the plaintiff when it kept such reasonable lookout at the time as its servants could keep under the conditions then existing, among which conditions was an absence of the moon, and no artificial light provided to take its place. The darkness, which it is contended imposed upon the defendant the duty of providing lights for the protection of the plaintiff, also enveloped the latter when he stepped from a place of safety on the pathway to the defendant's track, and should have suggested to him the increased danger of his situation. Having reached the conclusion, however, that the defendant company has failed in the performance of no legal duty that it owed the plaintiff, it is not necessary to consider the negligence of the latter.

For these reasons the judgment complained of must be affirmed.

Affirmed.

Statement.

Wytheville.

ATLANTIC COAST LINE RAILROAD COMPANY v. WATKINS.

June 15, 1905.

Absent, Cardwell, J.

- RAILROADS—*Communicated Fires—Burden of Proof.*—If the engines of a railroad company are equipped with the best spark arresters in known practical use, and they are in good order, and the engines are operated by competent and experienced servants, the company is not liable in damages for fires set by sparks from its engines at places off its right of way. If, under these conditions, it is sought to charge the company with liability for a fire communicated from its right of way, which was foul—this constituting negligence on its part—the burden is on the plaintiff to show affirmatively that the fire originated on the company's right of way. It is not sufficient to show a probability of that fact. Unless that fact is established there is no proof of negligence on the part of the company, and hence there can be no recovery against it. There is no presumption as to where such a fire starts.
2. *APPEAL AND ERROR—Verdicts—Insufficient Evidence to Support.*—Although cases at law are heard in this court as upon a demurrer to evidence by the plaintiff in error, this court will not hesitate to set aside the verdict of a jury if satisfied that the evidence is plainly insufficient to support it.

Error to a judgment of the Circuit Court of Chesterfield county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

George B. Elliott, for the plaintiff in error.

J. M. Gregory and *C. S. Sands*, for the defendant in error.

Opinion.

WHITTLE, J., delivered the opinion of the court.

This writ of error brings up for review a judgment in behalf of the defendant in error against the plaintiff in error in an action to recover damages for injury to the land and timber of the former, alleged to have been occasioned by fire which originated on the right of way of the plaintiff in error.

While it is conceded that the fire was caused by sparks emitted by one of the defendant's locomotives, it appears that the engine was equipped with the best mechanical appliance in known and practical use for preventing the escape of sparks. It also appears that the engine was in good repair, and in charge of a competent and experienced locomotive engineer. Therefore the defendant was not neglectful of any of its obligations to the public in those particulars. *Tyler v. Ricamore*, 87 Va. 466, 12 S. E. 799; *Patteson v. C. & O. Ry. Co.*, 94 Va. 16, 26 S. E. 393; *N. & W. Ry. Co. v. Perrow*, 101 Va. 345, 43 S. E. 614.

The remaining duty of a railroad company, in that connection, is to keep its right of way clear of combustible materials liable to ignition by sparks or coals of fire discharged from passing engines and to communicate fire to the property of others. *N. Y. P. & N. Ry. Co. v. Thomas*, 92 Va. 606, 24 S. E. 264; *Tutwiler v. C. & O. Ry. Co.*, 95 Va. 443, 28 S. E. 597. As a general rule, subject, of course, to exceptions in particular cases, where these responsibilities have been complied with, a railroad company fulfils its duty, and is not liable in damages for the escape of fire. *White v. N. Y. P. & N. Ry. Co.*, 99 Va. 357, 38 S. E. 180; *C. & O. Ry. Co. v. Heath*, 103 Va. 64, 48 S. E. 508.

The specific ground of negligence relied on to sustain the verdict and judgment under review is the allegation that the fire originated in dry swamp-grass on the defendant's right of way, and was communicated thence to the wood-land of the plaintiff—and that is the sole question presented by the record for decision.

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In approaching the consideration of that question, the court is mindful of the rule that the case is before it as upon a demurrer to the evidence, and that the inquiry touching the negligent starting or communication of fire to the plaintiff's property involves an issue of fact for the determination of the jury, and that an appellate court may not reverse a judgment founded thereon unless there has been a plain deviation from the evidence. But the converse of the proposition is equally true, that the court will not hesitate to set aside the verdict if it is satisfied that the evidence is plainly insufficient to support it. *Kimball & Fink v. Friend*, 95 Va. 125, 27 S. E. 901; *Reusens v. Lawson*, 96 Va. 285, 31 S. E. 528; *Marshall's Admr. v. Valley Ry. Co.*, 99 Va. 978, 34 S. E. 455; *Morien v. N., &c., Terminal Co.*, 102 Va. 622, 46 S. E. 907; *Seaboard, &c., Ry. Co. v. Hickey*, 102 Va. 394, 46 S. E. 392; *Moore Lime Co. v. Johnston's Admr.*, 103 Va. 84, 48 S. E. 557.

The burden of proof rests upon the plaintiff to show that the fire began on the right of way, for, unless that fact be established, the alleged negligence of the railroad company in suffering combustible matter to accumulate on its right of way was not the efficient and proximate cause of the accident.

Notwithstanding the evidence justifies the primary presumption that the fire started from a spark or coal of fire from the defendant's engine, it does not necessarily follow, and cannot be inferred from that circumstance alone, that it originated on the right of way. The case then presents two hypotheses of equal probability—the one, that the fire started on the right of way, in which event the railroad company would be liable; the other, that it started off the right of way, in which event the company would not be liable. It is incumbent on the plaintiff, therefore, in order to warrant a recovery, to establish the truth of the first hypothesis.

"It is . . . well settled that when damages are claimed for injuries inflicted through the alleged negligence of the defendant, not only is the burden of showing negligence by a

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preponderance of the evidence upon the plaintiff, but if the injury may have resulted from one of two causes, for one of which the defendant is responsible, but not for the other, the plaintiff cannot recover; neither can he recover if it was just as probable that the damage was caused by the one as by the other." *C. & O. Ry. Co. v. Heath, supra*; *N. & W. Ry. Co. v. Pool's Admr.*, 100 Va. 148, 40 S. E. 627; *Northington v. Ry. & Light Co.*, 102 Va. 446, 46 S. E. 475.

There is no direct evidence that the fire started on the right of way, and (independently of the positive evidence of the defendant that it started off the right of way) the circumstances tend to sustain the contrary theory.

The evidence on behalf of the plaintiff may be summarized as follows: On the morning of April 27, 1903, at about 11 o'clock, a short time after a passenger train had passed over the defendant's track, going from Petersburg to Richmond, the plaintiff discovered smoke rising in the woods in the direction of "Phillips' crossing" on the railroad. The railroad is more than a mile from plaintiff's residence, and he paid no particular attention to the fire at that time; but afterward, about 3 o'clock in the afternoon, he observed that the wind, which was blowing from the direction of the railroad, was driving the fire towards his premises, and rode over to investigate it. Thereupon he ascertained that the burnt district terminated along an irregular course, extending some distance on the line of the railroad, and in several places three or four feet upon the right of way. A week later the plaintiff, accompanied by a witness, visited the scene of the fire and determined the distance from the center of the track to the inner margin of the burnt area to be 30 feet, extending along a zig-zag line for about 250 feet. The witness also stated, what is matter of common observation, that a forest fire will "eat back against the wind"; and neither he nor the plaintiff could say at what point the fire started. The zig-zag line referred to, if broken, might have indicated that fires were set out separately and independently of each other, but it was continuous, a circumstance which rather conduces to the theory that the fire crept back against the wind.

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But however that may have been, it was incumbent on the plaintiff to solve the doubt, for, as recently remarked by this court, "The party who affirms negligence must establish it by proof sufficient to satisfy reasonable and well-balanced minds. The evidence must show more than a probability of a negligent act. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established. This court has repeatedly held that when liability depends upon carelessness or fault of a person, or his agents, the right of recovery depends upon the same being shown by competent evidence, and it is incumbent upon such a plaintiff to furnish evidence to show how and why the accident occurred—some fact or facts by which it can be determined by the jury, and not be left entirely to conjecture, guess, or random judgment, without a single known fact." *C. & O. v. Heath, supra*.

But the case does not depend entirely upon the plaintiff's evidence. The defendant introduced a witness who testified positively that he discovered the fire within a few minutes after the 11 o'clock train had passed "Phillips' crossing," and it was burning two or three yards outside the right of way. It is true the plaintiff undertook to contradict this witness, but his alleged discrepancies of statement left unimpaired the explicit declaration that the fire started off the right of way.

It thus appears that the evidence, as a whole, is plainly insufficient to sustain the verdict, and the lower court erred in overruling the defendant's motion to set it aside, for which error its judgment must be reversed and the case remanded for a new trial.

Reversed.

Statement.

Wytheville.

WRIGHT V. AGELASTO.

June 15, 1905.

1. **CONTRACTS—Conditions—Waiver.**—A contract made upon a condition precedent cannot be enforced unless the condition has been performed, or waived, or the party relying upon it is estopped from relying on it. If a waiver be relied on, it must plainly appear to have been distinctly made with full knowledge of the rights intended to be waived.
2. **INSTRUCTIONS—Directing a Verdict.**—An instruction which directs a verdict must be predicated upon *all* the material facts which the evidence in the cause proves or tends to prove.
3. **NEW TRIAL—After-Discovered Evidence.**—If, pending the trial of a case and before it is submitted to the jury, it is discovered for the first time that the evidence of a particular witness is material, it is the duty of the party wishing his evidence to ask the court for such delay as is necessary to procure the testimony of the witness, and it is the duty of the court to grant the request if the circumstances are such as would entitle the party, after judgment, to ask for a new trial on the ground of the absence of such witness. It is not good cause for a new trial on the ground of after-discovered evidence, in the absence of such a request.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

White, Tunstall & Thom, for the plaintiff in error.

Edward R. Baird, Jr., for the defendant in error.

Opinion.

KEITH, P., delivered the opinion of the court.

The defendant in error, Agelasto, as trustee in bankruptcy of the Chesapeake Furniture and Wood Working Company, sued Peter Wright in the Court of Law and Chancery of the city of Norfolk to recover a subscription to fifteen shares of stock of the Norfolk Furniture Company, of the par value of \$100 per share, subscribed to upon the condition "that \$15,000 *bona fide* subscriptions are gotten."

The defendant pleaded non-assumpsit, and a jury being impaneled, found a verdict for the plaintiff and assessed his damages at \$1,500. The defendant moved the court to set aside the verdict and grant a new trial, on the ground that it was contrary to the law and the evidence, that the jury had been misdirected by the court, and of after-discovered evidence. The court refused the motion to set aside the verdict, entered judgment for the plaintiff, and thereupon Peter Wright obtained a writ of error from this court.

During the progress of the trial exceptions were taken to the admission of certain testimony, but this exception has been very properly abandoned in this court.

The first assignment of error upon which reliance is placed is that with respect to the refusal of the court to give the following instruction:

"The court instructs the jury that even though they may believe from the evidence that the defendant applied for a charter for the Chesapeake Furniture and Wood Working Company, was named as one of the incorporators thereof, participated in the proceedings of its stockholders, and acted as a director of the company, yet if they further believe from the evidence that at the time of such action and participation in said meetings he did not know that *bona fide*, valid subscriptions to the amount of \$15,000 had not been obtained, such action and participation cannot be construed as a waiver of the condition on which his subscription was made, and they must find for the defendant."

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It is certain that the plaintiff in error, having subscribed to the stock conditionally, was not bound by the contract of subscription until the condition upon which it was entered into had been performed, or been waived by him, or he had by his conduct placed himself in a position which estopped him from relying upon the condition. It is equally certain that such conditions may be waived.

This proposition is not disputed, and needs no citation of authority in its support.

It is also true that no man can be bound by a waiver of his rights unless it be distinctly made with full knowledge of the rights which he intends to waive, and the fact that he knows his rights and intends to waive them must plainly appear.

The instruction under consideration concludes with the direction that if the jury shall believe from the evidence the facts which it recites, they must find for the defendant.

It is well settled in this court and elsewhere that an instruction which directs a verdict must be predicated upon all the material facts which the evidence introduced before the jury proves; or tends to prove. If, as recited in the instruction, "the defendant applied for a charter for the Chesapeake Furniture and Wood Working Company, was named as one of the incorporators thereof, participated in the proceedings of its stockholders, and acted as a director of the company," such acts were an unequivocal recognition of the existence of the corporation and his membership in it. If, indeed, he did these things in ignorance of the fact that valid subscriptions to the amount of \$15,000 had not been obtained, and did not thereby intend to waive the benefit of that condition, he should not be held bound. But it may very well be, and we think there is evidence in the record tending to show, that by these acts he intended to be bound, regardless of the condition upon which his subscription had been made, and it was, therefore, incumbent upon him to negative this view. The instruction should have stated that "if the jury believe from the evidence that the defendant . . .

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was named as one of the incorporators, participated in the proceedings of its stockholders, and acted as a director of the company, and that at the time of such action and participation in said meetings he did not know that *bona fide*, valid subscriptions to the amount of \$15,000 had not been obtained, *and did not intend by such acts to waive the benefit of the condition*, such action and participation cannot be construed as a waiver of the condition on which his subscription was made, and they must find for the defendant."

As the instruction was prepared and presented to the court, every fact which it states may have been true, and yet the defendant have been bound by his contract of subscription, and the plaintiff in the court below entitled to a verdict against him. He had the same opportunity of knowing that the subscription had not been obtained, if such was the fact, as any one else enjoyed. He may have known it, or he may have been in ignorance of it, and, either with knowledge that the stipulated amount had not been subscribed or in ignorance of the fact, he may have concluded that he would, in any event, be bound by his subscription.

We are, therefore, of the opinion that the court did not commit an error in refusing the instruction prayed for.

Nor do we think the court erred in overruling the motion for a new trial. There was evidence which strongly tended to prove that the condition upon which the subscription was made had been performed, and, as we have said, there is evidence which tends to show that the plaintiff in error had determined not to rely upon the condition, whether it was performed or not.

Nor do we think the court erred in refusing to set aside the verdict because of after-discovered evidence. There was in truth no after-discovered evidence in any proper sense of the term. Giving to the affidavits all the force and effect which can be imputed to them, it appears that the evidence now relied upon was known to the plaintiff in error before the case was submitted to the jury. It is true that the affidavit of plaintiff in error states that as soon

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as he ascertained from the evidence of Page, given in the trial, that the testimony of a witness would be material, he caused a summons to be issued for him, and the sergeant reported him absent from the city. It was the duty of plaintiff in error, under those circumstances, to have asked the court for such delay as might be necessary to secure the testimony of the witness in question. If the circumstances were such as would have entitled the defendant, after judgment, to ask for a new trial upon the ground of the absence of the witness, it needs neither argument nor authority to show that those facts and circumstances brought to the attention of the court at any time prior to the rendition of the verdict, would have been sufficient to induce, indeed to require, the trial court to give the defendant opportunity to secure the witness. In this case, as the event proved, a brief delay would have sufficed, for it appears that the witness returned to the city on the next day, and his affidavit was procured.

Upon the whole case we are of opinion that the judgment should be affirmed.

Affirmed.

Syllabus.

Wytheville.

CITIZENS BANK OF NORFOLK, RECEIVER, v. TAYLOR & Co.

June 15, 1905.

Absent, Cardwell and Whittle, JJ.

1. **CONTRACTS—Construction—Practical Construction of Parties.**—Manufacturers of ice having agreed to manufacture and deliver ice at their platforms during several months, and the purchaser, when sued for failure to accept and remove the ice as manufactured, claiming that he was only bound to accept the ice delivered on the outer platform, the court will adopt that construction of the contract placed upon it by the parties themselves during the period when there was no controversy on the subject, and which is a reasonable construction, to-wit, a delivery at the platform or inner storage room.
2. **APPEAL AND ERROR—Three Trials Below—Demurrer to Evidence.**—When there have been three trials of a case, and a verdict for the plaintiff in each of the first two has been set aside because contrary to the law and the evidence, and exceptions duly taken, and on the third trial there is a demurrer to the evidence by the defendant which is sustained, on a writ of error by this court on the application of the plaintiff, the records of the first and second trials are before this court for review, but they are not to be considered as on a demurrer to the evidence.
3. **NEW TRIAL—Three Trials Below—Demurrer to Evidence—Reversal—On What Verdict Judgment to be Entered.**—Where there has been three successive verdicts for the plaintiff, each for a less sum than the one which preceded it, and the first two have been set aside by the trial court as contrary to the evidence, and the third is rendered on a demurrer to the evidence by the defendant, which demurrer the trial court sustained, this court, upon reversal, will enter up judgment on the last verdict, as some latitude must be allowed to the discretion of the trial court, especially when the propriety of its exercise is affirmed by a verdict on the new trial for the party to whom it was granted, or the verdict, though for the same party, is for a substantially less sum.
4. **DEMURRER TO EVIDENCE—Rule of Decision.**—Where, upon a demurrer to the evidence, the evidence is such that a jury might have found a verdict for the demurree, the court must grant judgment in his favor.

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Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of assumpsit. Judgment for the defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

White, Tunstall & Thom and *J. W. Wilcox*, for the plaintiff in error.

Loyall & Taylor and *James E. Heath*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

The Citizens Bank of Norfolk, receiver of the Norfolk Ice Company, brought its action in assumpsit against Taylor and Company upon the following contract:

The Citizens Bank of Norfolk, receiver, "hereby agrees to sell to Taylor and Company, and Taylor and Company hereby agrees to purchase from the said receiver, sixty tons of canned ice, merchantable quality, and weighing two hundred and three hundred pounds, full weight, each can or piece, during each and every day of the month of May, 1903, and the entire output of both of the plants now in the hands of the receiver, and known as 'Hygeia' and 'Citizens' plants, during the months of June, July, August, and September, 1903; the said entire output not to exceed one hundred and ten tons per day; and forty tons during each and every day of the months of October and November, 1903; and sixty tons during each and every day of the month of April, 1904; the said ice of the quality and quantity aforesaid to be delivered to the said Taylor & Company, or on their orders, at the platforms of the said several plants operated by the said receiver; the said Taylor & Company hereby agreeing to pay to the said receiver for the said ice at

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the rate of \$2.20 per ton of two thousand pounds; the said purchase price to be settled for in cash on or before the tenth day of the month next succeeding the delivery thereof, during the pendency of this contract.

"It is further understood and agreed that the said receiver shall keep on hand and refrigerated at the 'Citizens' plant an amount of ice not exceeding three hundred and fifty tons at any one time, unless otherwise agreed upon in writing by both parties hereto.

"It is further understood and agreed that during the continuance of the contract now existing between the said receiver and the Fruit Growers Express, the said receiver is to reserve from the amount of ice manufactured by it at the said plants whatever quantity of ice may be necessary to fill the said contract, which said contract ends the 30th day of June, 1903."

The defendant pleaded the general issue, and certain special pleas, and the jury at the first trial found a verdict for the plaintiff for \$2,000, which was set aside by the court. At the second trial there was a verdict for \$1,500, which was set aside by the court; and at the third trial there was a verdict for the plaintiff for \$1,288, subject to a demurrer to the evidence, upon which the court gave judgment for the defendant. Upon each of these trials exceptions to the ruling were taken by the plaintiff in error, the record preserved, and all of them are now before this court for review. The question for us to determine is, shall the judgment be affirmed, or, if it is to be reversed, upon which verdict shall judgment be rendered in favor of the plaintiff in error?

It is not altogether clear from the record upon what ground the court acted in setting aside the first and second verdicts; but looking to the record of those trials and to the subsequent action of the court in entering judgment for the defendant upon the demurrer to the evidence, it would seem that the court was of opinion that the defendant, having taken all the ice manufactured by the plaintiff during the month of June, 1903, had

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discharged its duty; while the contention of the plaintiff in error is, that, though the defendant took and paid for its actual output during that period, it did not take the quantity which it was ready to manufacture and deliver up to the limit of 110 tons prescribed by the contract, and that it was hindered in its manufacture of ice by the conduct of the defendant. The contract calls for canned ice, each block weighing "two hundred and three hundred pounds," full weight, the defendant contracting to take the entire output of both plants operated by the receiver, with the provision that this output was not to exceed 110 tons per day, "the said ice of the quality and quantity aforesaid to be delivered to the said Taylor & Co., or on their orders, at the platforms of the several plants operated by the said receiver."

During the month of May the sixty tons provided for in the contract for that month was delivered and received in accordance with the contract. On June 4, 1903, Nichols, the manager of the ice plants, addressed Taylor & Co. the following note:

"In accordance with terms of contract you were to take the full capacity of both plants during the months of June, July, August, and September. We desire to inform you that we are prepared to operate in full from June 1st; that we now have, subject to your orders, on storage, 271 tons of ice from last month's supply, and with the daily increase the amount of your storage capacity with us will soon have reached its limit. Enclosed please find bill for 220 tons 290/2000 lbs., due you on May purchase, now on storage and held subject to your order."

The platforms of the ice plants were uncovered, and ice placed upon them, under the influence of the sun, quickly deteriorated—not only lost its weight by melting so as to fall below the standard weight required by the contract, but its quality rapidly became so impaired as to render it unmarketable. The platforms, too, had a very limited capacity, but adjacent to and communicating with them were store-rooms in which a considerable amount of ice could be kept, and it was the custom of the

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ice company to place the ice as manufactured in the store-rooms and transfer it to the platforms when Taylor & Co. were ready to receive it. This course, or custom, was pursued during the month of May without protest or objection, so far as the record discloses. It seems to have imposed no inconvenience upon Taylor & Co., but to have been in their interest as well as in that of the plaintiff in error. Indeed, it would have subverted the convenience of plaintiff in error to have placed the ice, as far as it could be done, on the platforms and required the defendant in error to take it or leave it at its peril.

The contention of defendant in error is, that it was the duty of plaintiff in error to go on and manufacture the ice, place it on the platforms, and that it would be for the defendant in error to take it or not, as it saw fit, but the condition precedent having been performed, it concedes that it would have been liable for the price. That seems to be an unreasonable construction of the contract, looking to its subject matter. It was a continuing contract with reference to a subject of a perishable character, and a reasonable construction, and that which the parties themselves had placed upon it, and that under which they had lived during the month of May, is that which should prevail. This was evidently the view taken of the case by the juries, for in three successive trials they found verdicts for the plaintiff.

Although the records of the first and second trials are before us for review to ascertain if any errors have been committed on such trials, they are not to be considered as upon a demurrer to the evidence. But some latitude must be allowed to the discretion of the trial court in setting aside a verdict as contrary to the evidence, and this is especially true where, on the new trial, a verdict is found for the opposite party, or the amount of the verdict is materially diminished. *Chapman v. Va. Real Estate Investment Co.*, 96 Va. 177, 31 S. E. 74; *Marshall v. Valley R. Co.*, 99 Va. 798, 34 S. E. 455.

While in each case there was a verdict for the plaintiff, that verdict was in each instance somewhat diminished, being reduced from \$2,000 upon the first trial to \$1,288 upon the

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final trial. Upon the last trial, however, the case stood strictly upon a demurrer to the evidence, and the evidence was sufficient to go to the jury. The whole situation was before the jury. They visited the locality; they heard and saw the witnesses; they knew the course of dealing that prevailed; and we are of opinion that the evidence was sufficient to support their verdict, and the court erred in not rendering a judgment upon the demurrer to the evidence in favor of the plaintiff for the sum of \$1,288.

For these reasons we are of opinion that the judgment should be reversed, and this court will enter such judgment as the Circuit Court should have rendered.

Reversed.

Statement.

Wytheville.

BEACH AND ANOTHER V. BELLWOOD AND OTHERS.

June 15, 1905.

1. **QUIETING TITLE**—*Bill to Remove Cloud*.—A person in possession of land, with a fee simple title, may file a bill to remove a cloud from the title.
2. **REFORMATION**—*Fraud and Mistake—How Charged—General Relief*.—Where fraud or mistake is relied upon as a ground of equitable relief, the particular manner in which the fraud was committed or the mistake made, and the end or design to be accomplished, must be set forth in the pleadings. Where the facts stated in a bill show what was the real agreement between the parties, and that a material part was, by mistake, omitted from the agreement when it was reduced to writing, the bill is sufficient to entitle the party injured to a reformation of the written instrument under the prayer for general relief.
3. **PAROL EVIDENCE**—*Varying Written Instrument—Mistake—Equitable Relief*.—Where there has been an omission of a material stipulation in a written instrument contrary to the intention of the parties and under a mutual mistake, equity will intervene to grant relief.
4. **PAROL EVIDENCE**—*Varying Written Instruments—Mistake—Equitable Relief—Reformation*.—While parol evidence will not be received to vary, alter or contradict the terms of a valid written instrument, still if it be clearly shown by proof which is entirely satisfactory that, by mistake of the draftsman, a writing does not truly set forth the agreement of the parties as previously entered into by them, equity will correct the mistake so as to make the instrument conform to the real agreement of the parties. Such mistake may be shown by parol, but the evidence of it must be clear and convincing, and such as to leave no fair and reasonable doubt upon the mind that the writing does not correctly embody the intention of the parties.

Appeal from a decree of the Law and Equity Court of the city of Richmond in a suit in chancery. Decree for the complainant. Defendants Beach and Short appeal.

Affirmed.

Opinion.

The opinion states the case.

Jo. Lane Stern and *James Parker*, for the appellants.

William L. Royall, for the appellees.

CARDWELL, J., delivered the opinion of the court.

The facts out of which this controversy arises are as follows: Appellee, complainant in the court below, James Bellwood, was in the early part of 1898 the owner and occupant of a large farm, situated in Chesterfield county, immediately on the Petersburg turnpike, about seven or eight miles from the city of Manchester, and between appellee's farm and the city of Manchester there is a tract of 435 acres, then owned by one George A. Madill, of St. Louis, Mo., which latter tract will be spoken of here, as in the record, as the Madill tract. The Madill tract fronts about one mile upon the turnpike, extending back to James river, and includes the famous and historic spot called "Drewry's Bluff." For some years Bellwood had desired to become the owner of the Madill tract, as one that would make a most valuable addition to his own farm by giving it especial advantages, independent of its mere intrinsic value, and accordingly he had negotiations with Madill in reference to its purchase; and in consideration of his agreeing to exercise a supervision over it, Madill agreed that he could have a preference over all others in purchasing it in case he (Madill) resolved to sell it.

In the spring of 1898, Corbin Warwick, of the city of Richmond, conceived a scheme for building an electric railroad along said turnpike from Manchester to Petersburg, and laid his plans before William L. Royall, of the same city, who joined with him in the undertaking, and these two took into conference one John C. Short, of the city of New York, who represented to them that he was a broker of that city and connected closely

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with strong financial people, amongst whom he could easily raise the necessary money for the enterprise if a charter of incorporation was secured. Thereupon an agreement was entered into between Warwick, Royall and Short, that Warwick and Royall should secure a charter for the enterprise, and Short was then to secure the necessary money, and whatever was realized as profits from the enterprise was to be divided into halves, of which Short was to have one-half and Warwick and Royall were to have the other half, to be divided equally between them. Warwick and Royall obtained the charter from the Legislature, incorporating the Richmond & Petersburg Electric Railway Company. Warwick's plan for the electric railroad, contemplated the acquisition of the Madill tract and the conversion of "Drewry's Bluff" into an ornamental pleasure ground, to which the electric road would carry hundreds of thousands of visitors each year. Warwick considered this park the most attractive feature of the scheme, and the one that would most surely make the enterprise a paying one from the beginning, and in this view both Royall and Short concurred, the latter considering it the pivot upon which the whole enterprise was to turn. In connection with that view, Short in a letter to Bellwood, of April 3, 1899, referring to proceedings by the R. P. & C. R. R. Co. to condemn a right of way through the Madill tract, says: "I am glad you notified the man who accompanied the sheriff that he had better notify his railroad company that the Madill land had been purchased for a public park, and that it was the corner-stone of the whole enterprise, and the carrying out of the plans would cost several hundred thousand dollars." Bellwood was of opinion that an electric road upon the pike from Manchester to Petersburg would be a paying one, and of the greatest value and importance to those who resided upon its line, and that it would be of the very greatest value and importance to himself, and he was willing to contribute of his time, labor, and money to secure its construction.

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Warwick solicited Bellwood to obtain from Madill, for him (Warwick) an option to purchase the Madill tract, which Bellwood applied to Madill for, but he (Madill) refused to give Warwick the option. Thus matters stood until February, 1899, when Short came to Richmond, and he and Warwick went together to visit Bellwood and the Madill tract; and as there had been so much talk about the acquisition of the Madill tract, Bellwood concluded the time had arrived when he must buy it, and he had a few days before this written to Madill concerning its purchase, and had received from him an offer to sell him the land for \$5,000—\$1,000 to be paid in cash, the rest in three annual notes, secured by deed of trust on the land, the purchase to be closed by February 20th. Bellwood showed this offer, which was in a letter from Madill, to Short and Warwick when they were on the visit to him just mentioned, and he told Short that if he was going to build the electric road he would let him have the land to be converted into a park in connection with the road, and also told him he had long wanted the land as an addition to his farm and would not allow it to go for anything or to anybody except the electric road. This was understood by Short at the time, and he agreed that the land should be taken as a part of the electric road scheme, saying that he would commence to build the road within thirty days and have it completed in ninety days, and that he would spend sixty thousand dollars on the park, etc. It was then further agreed that Short would put up the \$1,000 cash payment; that Bellwood would buy the Madill land in his own name, giving his three notes for the deferred payments, and deed of trust on the land to secure them; and on this understanding Madill was notified by Bellwood that his offer was accepted, and was asked to send a deed to the property to a bank or trust company in Richmond, in order that the purchase might be closed. Short got the \$1,000 from his son-in-law, Ferdinand Beach, and in the interval between closing the contract and settling for the land there was some discussion about how the title of the land was to stand,

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there being some disagreement between Short, Warwick, and Royall upon this point. Short and Warwick wanted a separate land company to hold the land, so that it would not be covered by the railroad mortgage, while Royall wanted the land conveyed directly to the railroad company so as to make that enterprise as strong as possible. It was finally agreed that there should be a land company to hold the land, and in the mean time Short wanted the title conveyed to his son-in-law, Beach, but Bellwood raised the point that if this was done Beach might cut and remove the timber, the railroad scheme might fall through and he be left to pay for and take the land with the timber gone. To meet this suggestion, it was proposed by Royall that the land be conveyed to Beach by a deed held in escrow till Bellwood's notes were paid, which proposition was satisfactory to Short, except that he wanted to form the land company at once and get possession of the land, and to accomplish this it was agreed that a provision should be inserted in the escrow, that if the land company was formed and issued its bonds, not to exceed \$100,000, on depositing \$8,000 of these bonds as collateral security to Bellwood, the deed might be delivered to Beach, and with this understanding Bellwood was satisfied, he also understanding, as did the other parties to these negotiations, that the proposed land company and the electric railroad were to be under the same management and control. This understanding being reached, Warwick being in possession of Beach's certified check for \$1,000, Warwick and Bellwood and wife met at Royall's office to complete the transaction. Bellwood having entire confidence in Royall, left to him the preparation of all papers necessary to carry out the agreement between the parties. Madill's deed conveying the property to Bellwood had been deposited with the State Bank, together with the deed of trust that Madill wanted, securing the deferred payments, and Royall prepared a deed conveying the Madill tract in fee simple to Beach, and also prepared an escrow paper, addressed to the State Bank, which

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was expected to hold the deed, directing it to deliver the deed to Beach when he paid Bellwood's notes. The bank refused to hold the deed in escrow, and by agreement between the parties present it was left in the possession of Royall.

The escrow paper referred to, is as follows:

"To William L. Royall, Esq.:

"We herewith deposit with you a deed conveying the Drewry's Bluff tract of land on James river, in Chesterfield county, Virginia, to Ferdinand Beach, of New York, to be held by you until the notes of James Bellwood for \$1,000.00 payable to George A. Madill and given for the deferred payments on said land, are paid by the said Ferdinand Beach. But if John C. Short, of New York, and his associates, shall organize the Drewry's Bluff Land Company, as proposed by them, and shall create a first mortgage subject to present deed of trust, on said Drewry's Bluff tract of land, to secure the payment of not more than \$100,000 of bonds, then if they deposit with you \$8,000 of said first mortgage bonds as collateral security to me that said Beach will pay or cause to be paid said notes, you will be at liberty to deliver said deed to said Beach, and the said Short and associates will be at liberty to withdraw \$2,000 of said bonds whenever they pay \$1,000 of said notes.

"JAMES BELLWOOD,

"HELEN E. BELLWOOD."

"April 14th, 1899.

Royall had been one of the interested parties in the transaction. He had been a party to all the negotiations, and knew them in all their details. He knew that Bellwood's position was that Short, Warwick, and Royall might have the land if they built the road, but that he allowed them to have it only upon the condition that the road was built, and reserved the land to himself unless the whole scheme, road and park together, was put into force and effect in conjunction, and as one enterprise, and that it was never contemplated by Bellwood that Short, Warwick, and Royall, or anyone else, should have

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the land as a real estate speculation, or for any purpose other than for a park in conjunction with the electric road they had agreed to build. Bellwood having given Royal no specific instructions except that his rights, as he knew Royall understood them, were to be protected, signed all the papers that Royall told him to sign, including the escrow paper, and Royall, instead of setting out the whole understanding as he knew it to exist, drew the papers in the form in which they now stand.

Upon the deed from Bellwood to Beach and the escrow paper being deposited with Royall, things drifted along, Short keeping up his promises that he would soon have the money; but finally it became plain that he had no money, and had access to none with which to build the road. In the meantime Bellwood's first note for the deferred payments for the Madill tract, due in March, 1900, was about maturing, and he wrote Short and asked him what was to be done. Short replied that he was unable to pay the note, and said to Bellwood: "If you will pay it I will give you a \$1,000 bond of the electric road." Whether Bellwood paid any attention to this offer or not does not appear, but, being bound for the note, he paid it at maturity. Some time thereafter all hope of the electric road being built through the efforts of Short, Warwick, and Royall vanished, and they sold out all of their interest in the enterprise to one Haner, representing some Ohio capitalists, in December, 1900, when the charter had only about three months to run. Royall and Warwick concede that Haner and Company got all their rights in the Madill land, but Short claims that he only sold his rights in the road and reserved his rights in the land.

This state of things having come about, Bellwood demanded that Royall return to him the escrow paper and the deed to Beach for the Madill tract, so as to make his title to the land complete, but Short objected, and Royall declined to deliver the papers to Bellwood, and told him that he must wait until the charter expired. Thereupon Bellwood filed his bill in this cause to compel Royall to surrender the escrow paper and deed to him, in order to quiet the title in him to the Madill tract.

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The bill, after setting out at length and in detail the facts and circumstances hereinbefore stated, proceeds as follows:

“But your orator wishes to make this point clear: that he did not direct Royall to draw up the instructions (escrow paper) as they appear. He knew that Royall was cognizant of all of the facts in the case and approved of the arrangement; he had entire confidence in the integrity of Royall, and he instructed him generally to prepare the papers in such form as to protect him, and that was the whole of the instructions given. If Royall had carried out your orator’s instructions literally he would have written a paper which recited all the facts as they have been detailed here. But, believing, as your orator did, that Short had secured the money for the enterprise, he wrote only so much of your orator’s instructions as he thought necessary for your orator’s protection as the matter then stood.

“Your orator wishes now to charge distinctly and categorically that there was a perfect understanding between Short, Royall, Warwick and your orator, that in thus acquiring this Madill tract it was acquired for the purpose of being an integral part of the proposed electric road, and that Royall, Short, and Warwick perfectly understood that your orator took the part he did in the transaction to make said tract an integral part of said road, and that he would never have permitted that tract to have passed away from himself except to be an integral part of said road. Short, Warwick, and Royall all understood this perfectly, and all assented and agreed to it. To make this clear Dr. Ferdinand Beach wrote Short a letter, of which a copy is filed as a part of this bill, marked as Exhibit No. 3, and Short deposited that letter with Royall, who holds it now. In a proceeding to condemn a right of way through this Madill tract, Short appeared as a witness and testified that the tract was to be an integral and most important part of the road.

“It is true that while Short, Royall and Warwick were the equitable owners of the proposed road, they sometimes contemplated having a separate land company to own the park and

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sometimes contemplated that it should be owned by the Old Dominion Construction Company, and sometimes contemplated that the railroad company should own it directly, and your orator knew of these changes in their purposes. But he also knew that Royall, Short and Warwick would be the owners of whichever company held the park and the said railroad company also, and he was indifferent as to the form in which they held the park so long as both road and park were owned by the same parties. In point of fact the last resolution upon the subject reached by Short, Royall and Warwick was come to in the summer of 1899, and they then determined that the park should belong to the railroad company directly, and this resolution has never yet been altered by them, and it would be a serious and irreparable injury to your orator, in violation of your orator's rights, if he lost this tract of land by its going to any one but an electric railroad such as he has taken part in securing."

In the letter filed as Exhibit No. 3 with the bill, written by Ferdinand Beach, addressed to Short, the writer says: "I am in receipt of your letter of the 24th instant advising me that by the terms of the contract you have recently signed for the construction and equipment of the Richmond & Petersburg Electric Railway, it is provided that the tract of four hundred and thirty-five (435) acres of land at Drewry's Bluff, which was purchased by Mr. James Bellwood in the interest of the railway company, but was conveyed to him, and by him to me in the same interest, and which conveyance was taken by me in trust, to be conveyed in due time to a land company to be organized for the creation and improvement of a park at Drewry's Bluff, on the line of the Richmond & Petersburg Railway, is to be conveyed in due time to the said railway company. The deed of conveyance from Mr. Bellwood to me is now held in escrow by Mr. W. L. Royall, of Richmond, for delivery to me on my order, in accordance with the terms upon which it is held in escrow.

"I therefore hereby make this declaration: The said land was purchased in the interest of the Richmond & Petersburg Electric

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Railway Company, and that Mr. W. L. Royall, holding Mr. Bellwood's deed to me, holds the same in the interest and for the benefit of said railway company, and that in due time the title of said land is to be conveyed to the railway company, either by the surrender to Mr. Bellwood of the deed I now hold, and the making of a deed by Mr. Bellwood direct to the railway company, or as an alternative the Bellwood deed to me is to be recorded and a deed is to be made directly from me to the railway company, as you as president of the Old Dominion Construction Company, may deem best and direct."

The bill makes the further averment, that "your orator is informed that the said John C. Short, after having been nothing but a burden upon and embarrassment to this enterprise from the beginning, claims now that the said Madill tract must pass under his control. Your orator recently demanded of the said Royall that he surrender to him the said deed held by him in escrow, but the said Royall refused to do so unless authorized thereto by said Beach and said Short. Your orator thereupon visited New York, saw J. C. Short, and tendered to him as agent for Dr. Beach the \$1,000 advanced by him, with interest to the time of its tender, but the said Short as Beach's agent refused to receive the same, and set up a claim to the said property for himself and associates.

"There was no written agreement between your orator and Ferdinand Beach, or between your orator and Short, and any one else, nor any memorandum or note in writing signed by your orator or his agent whereby your orator agreed to sell this property to Beach or Short, or to the said electric railway company, or to anyone else.

"So that your orator claims that he has never made any contract with any person or corporation whereby he has bound himself to part with this tract, and that the said Short vainly asserts that your orator is under any obligation of any sort in respect to the same, and that your orator's sole obligation is the equitable

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one to return to Dr. Ferdinand Beach his \$1,000 with interest, and this he is ready to do, and he prays the court that he may be allowed to bring the same into court and deposit it subject to the said Beach's order, as the court may allow him to have it."

After making Short, Warwick, Royall, Beach and others deemed necessary parties to this suit, defendants thereto, the bill concludes: "Your orator shows that all of these facts and circumstances constitute a cloud upon his title to the said Madill tract of land, and he therefore prays that . . . your honor will decree that none of them (the defendants) have any such or any other claim upon the said tract of land, and that said decree shall bar each and every one of them forever from setting up a claim of any sort in, to, or upon said tract of land; that your orator may be permitted to deposit \$1,000 and interest in this honorable court for the said Dr. Ferdinand Beach, and that therefore the said William L. Royall may be required to surrender to your orator the deed and declaration held by him as aforesaid in escrow," etc.

To this bill Short and Beach filed a joint and several demurrer and answer, and other parties named defendant, including the Richmond & Petersburg Electric Railway Company, filed answers also; but it is not necessary for us to refer further to the answers other than that of Short and Beach, they being the only parties appealing from the decree of the lower court.

The answer of Short and Beach admits the correctness of many of the statements made in the bill, and with a general denial of all other allegations of the bill not admitted to be true, they make an elaborate and detailed statement of the facts and circumstances out of which this controversy has arisen. Among the statements contained in their answer is the following with reference to the purchase of the Madill tract of land: "Said Madill to make a deed in fee simple to the complainant for the consideration of five thousand dollars, payable \$1,000 in cash, for the balance of said purchase price complainant to give his

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three notes for \$1,333.33 $\frac{1}{3}$ each payable to said Madill one, two and three years from date, with interest at six *per cent. per annum*, and execute a deed of trust upon said Madill tract to secure the payment of said notes; said respondent, Ferdinand Beach, to make the cash payment of one thousand dollars and agree to pay said notes, and complainant and wife to make a deed in fee simple of said Madill tract to said Beach and deliver the same to the State Bank of Virginia at Richmond, to be held by it until said Beach should pay said notes according to the terms of said deed of trust, and when said notes were so paid said bank was to deliver said deed to said Beach."

With reference to the letter, Exhibit No. 3 with the bill, written July 25, 1899, the answer says it was written long subsequent to the purchase of the Madill tract and to the execution of said deed, deed of trust and said notes, and when the control of both the railway company and the construction company was exclusively in Short, Warwick and Royall, and when it was not contemplated that such control would pass to outside parties. "And respondents further emphatically allege that said letter was written for the purpose of being used before the commissioners appointed in the proceedings instituted by said Richmond, Petersburg & Carolina Railway to condemn the right of way through the Madill tract, and for no other purpose whatever; and that having served its purpose and the conditions under which it was written having entirely changed, it has no bearing upon and is not applicable to the present condition of things."

In other words, these respondents admit in that letter all that the complainant, Bellwood, claims with reference to what was the real contract between them as to the Madill tract, but now say this was done for the purpose of misleading the commissioners appointed to assess damages to the property by building the line of the R. P. & C. Railway through the Madill tract, and should not be regarded as any admission from these respondents of the correctness of the complainant's position with refer-

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ence to the Madill tract in a controversy in which they are claiming, or at least Beach claims, an exclusive right to the Madill tract in the face of what was the real agreement between these respondents and Bellwood. Short, in his joint answer with Beach, notwithstanding the assertions theretofore made of his rights in the Madill tract which were instrumental in preventing the delivery back to the complainant of the deed and escrow deposited with Royall, says that he has no claim or title whatever to said Madill tract or any part thereof, while Beach alleges and claims that he is the owner in fee simple of the whole of said Madill tract, subject only to the obligation assumed by him to pay the whole of said notes with interest, etc.

Upon the hearing of the cause upon the bill of complaint, the exhibits therewith, the demurrer thereto and the answers of Short and Beach and others, the voluminous testimony introduced by both parties consisting of depositions and numerous letters and other writings, the court below overruled the demurrer and granted the prayer of the complainant, the decree directing the defendant Royall to deliver to Bellwood the deed from him and wife to Beach for the Madill tract, and the escrow paper hereinbefore referred to; and further decreeing that each and every defendant to the cause be forever barred and enjoined from asserting any claim or demand whatever upon and against the Madill tract of land, but before Royall was authorized to surrender said deed and escrow paper to Bellwood, and before Bellwood could have any advantage whatever under the decree, he or some one for him should deposit in the Union Bank of Richmond to the credit of the court in this cause, the sum of one thousand dollars with interest thereon from April 14, 1899, until the day of such deposit, less the cost of this suit, etc. From this decree Beach and Short alone appeal to this court.

The bill filed by appellee, Bellwood, avers that he took a conveyance of the tract of land (Madill tract) and went into the possession thereof, and makes the deed a part of the bill, which deed conveys to Bellwood a fee simple title; and the other aver-

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ments of the bill, the material parts of which we have already stated, make a case for the jurisdiction of a court of equity to grant the relief prayed, and therefore the demurrer of appellants to the bill was properly overruled.

The main question presented is whether or not parol evidence is admissible to prove the case stated, and it is contended for appellants that the bill is not sufficient to entitle Bellwood to the relief he seeks on the ground of mistake. It is a settled rule of law that the decree must be restricted to the case made by the pleadings, and it is equally well settled that where relief is sought on the ground of mistake or fraud, the mistake or fraud, as the case may be, must not only be charged but must be proven by clear and satisfactory proof. When mistake or fraud is relied on, the ground of relief should be charged by setting forth the particular manner in which the mistake was made or fraud was committed, and the end or design to be accomplished. Where the facts stated in the bill show what was the real agreement between the parties and that a material part was by mistake omitted when the agreement was reduced to writing, the bill is sufficient to entitle the party injured to a reformation of the written instrument under the prayer for general relief.

The court is of opinion that the bill sets out a state of facts showing a mistake, a mutual mistake, in the making and execution of the escrow paper filed with W. L. Royall. If the proofs, however, are doubtful and unsatisfactory to show that there has been the mistake averred in the bill, equity will withhold relief upon the ground that the written paper ought to be treated as the full and correct expression of the intent of the parties; but equity interferes in case of written instruments, where there has been an omission of a material stipulation contrary to the intention of the parties and under a mutual mistake. Story on Equity, 152, 155.

The rule relied on by appellants is thus stated in Greenleaf on Evidence, section 275: "Where parties have deliberately put their engagements into writing in such terms as to import a

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legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their understanding was reduced to writing; and all oral testimony of a previous colloquium between the parties, or conversation and declarations at the time it was completed, or afterwards, is rejected."

If there were no qualifications to this rule, there would be no such thing as reforming a written contract, but the qualifications to the rule are as clearly established as the rule itself.

In section 866, Beach on Mod. L. of Con., the author says: "When an agreement is made and reduced to writing, but, through mistake, inadvertence, or fraud, the writing fails to express correctly the contract really made, a court of equity will reform the instrument in conformity with the real intention of the parties. Accordingly, where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which by mistake of the draughtsman, either as to fact or law, does not fulfil, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement." See also to same effect Kerr on Fraud & Mistake, p. 418.

In *Slaughter v. Smither*, 97 Va. 202, 33 S. E. 544, it was sought to set up by parol evidence a contract between the parties inconsistent with the written agreement entered into by them and upon which they had acted, without averment or proof of fraud or mistake in the preparation of the written agreement.

All that is held in *Towner v. Lucas*, 13 Gratt. 705, applicable to the case under consideration, is that parol evidence will not be permitted to add a parol agreement to a written contract which is inconsistent with and contradictory of it. That is not this case.

In *Mauzy v. Sellars*, 26 Gratt. 641, the syllabus is: "A court of equity will correct a mistake clearly proved by parol evi-

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dence, in an agreement for the sale and purchase of real estate; and this, whether the contest is between the vendor and purchaser, or the vendor and creditors of the purchaser." In the opinion by the learned Judge Staples, reviewing both the American and the English decisions as to the power of a court of equity to give relief against any deed or contract in writing founded on mistake or fraud, it is said: "These and a multitude of other cases which may be cited, show it is the constant practice of the equity courts to admit parol evidence of mistake of fact, and though such evidence is in direct contradiction of the express terms of the deed or other writing. *Kerr on Fraud & Mistake*, 418, 423. The only limitation on this doctrine is, that the evidence in all such cases must be very strong and clear, such as to leave no fair and reasonable doubt upon the mind, that the writing does not correctly embody the intention of the parties. If, therefore, the controversy here was between the vendor and purchaser, parol evidence is clearly admissible to establish the alleged mistake in the written agreement, even against the answer of the purchaser."

The opinion quotes from 1 Story's Eq. Jur., sec. 152, as follows: "One of the most common classes of cases in which relief is sought in equity on account of mistake of fact is that of written agreements, either executory or executed. Sometimes by mistake the written agreement contains less than the parties intended; sometimes it contains more; sometimes it simply varies from their intent by expressing something different in substance from the truth. In all such cases, if the mistake is clearly made out by proof entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties.

"A court of equity would be of little value if it could suppress only positive fraud, and leave mutual mistakes, innocently made, to work intolerable mischief, contrary to the intention of the parties. It would be to allow an act originating in innocence to operate ultimately as a fraud, by enabling the party who re-

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ceives the benefit of the mistake to resist the claims of justice under the shelter of a rule framed to prevent it. In a practical view, there would be as much mischief done by refusing relief in such cases as there would be introduced by allowing parol evidence in all cases to vary written contracts." See also *Alexander v. Newton*, 2 Gratt. 260.

The quotation from Story is peculiarly applicable to the case we have under consideration.

We shall not attempt to review the evidence at length. The greater portion of it is immaterial. The real agreement between the parties, Bellwood on one hand and the appellants on the other, appears from the averments of the bill which we have very fully set out, and which are sustained by the testimony of Bellwood, Warwick and Royall, by letters and documents, and is, practically, not contradicted by any one except Short, whose testimony is not only inconsistent with, but contradictory in many respects of, statements made by him orally and in writing prior to the institution of this suit. That Royall was expected to set out Bellwood's rights by embodying the real agreement as to the Madill tract in the escrow paper, and that it was Royall's neglect or carelessness that this was not done is testified to by both Bellwood and Royall, and there is no testimony to the contrary. It was understood, not only as between Bellwood, Short, Warwick and Royall but by Beach himself, that Bellwood was not to part with the title to the Madill tract until Short fulfilled his promise and undertaking, and not only provided money with which to build the electric road from Richmond to Petersburg, but to pay for the Madill tract which was then to become an integral part of the electric road enterprise. That Beach so understood, that this was the real agreement embodying the only terms upon which Bellwood was to part with the title to the Madill tract, is clearly disclosed by the letter written by Beach to Short, which is filed as Exhibit A with Bellwood's bill, and which we have set out in full. In his testimony, Short admits that he not only dictated but wrote that letter for Beach to sign,

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and this conclusively shows that the real contract with Bellwood with reference to the Madill tract, and for which Bellwood is now contending, was not only understood by Short, but was understood and acquiesced in by Beach; so that any paper setting out the terms and conditions upon which a deed from Bellwood to Beach for the Madill tract was to be delivered to Beach, and which omitted the stipulation that Bellwood was not to part with the title to the property except in the event that Short, Warwick and Royall built the electric road and the land became an integral part of that enterprise, was a mistake—a mutual mistake—which if not corrected would be a manifest injustice to Bellwood.

It may be that Beach “was not in this matter for his health,” as his counsel puts it, but it is clearly the case that he had no connection with it except to advance, at the instance of his father-in-law, Short, the thousand dollars which was paid on the Madill tract, and which he understood was to be purchased and held in accordance with what was the real agreement between the parties concerned, and neither he nor Short ever suggested anything to the contrary of Bellwood’s contention as to what the agreement was until long after Short had failed to provide the money with which to build the electric road and pay for the Madill tract, and the road had been built, or was in the process of being built, by other parties, so that it became very desirable for Beach and Short to acquire title to the Madill tract for speculative purposes.

It would be almost, if not quite, absurd to say that Bellwood paid his first note for the deferred payments on the Madill tract because induced to do so by the offer of Short to give him a thousand dollar bond of the electric road, when Short had no interest in such a road in process of being built, and Bellwood, as well as Short, then well knew that it would not be built as the result of any efforts of Short. The facts are, that Beach had then no expectation that the conditions upon which the Madill tract was to be conveyed to him would ever come about, and relying upon

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getting back his \$1,000 out of the Madill tract, he simply abandoned all connection with the purchase of the property, and Bellwood, who was not only bound for the notes he had given, but was in possession of the property and paying taxes thereon, naturally went forward and paid the note; and when it was clearly seen that the conditions upon which he alone was to part with the title to the Madill tract would never be brought about, he, also very naturally, demanded of Royall the return of the deed deposited with him, in order that his title to the Madill tract might be made clear.

Upon the whole case, we are of opinion that there is no error in the decree complained of, and it must, therefore, be affirmed.

Affirmed.

Statement.

Wytheville.

VIRGINIA PASSENGER & POWER CO. v. PATTERSON.

June 15, 1905.

1. **ESCROWS—Delivery to Agent—Ignorance of Agency—Notice.**—A deed cannot be delivered in escrow to the known agent of the grantee. If so delivered, the delivery is absolute, and the condition is void. If a deed be delivered in escrow to one who is in fact the agent of the grantee, but that fact is unknown to the grantor, an instruction to the jury that if the agent disclosed the condition to his principal it is binding on him, but if he did not disclose it and the principal entered upon the land granted in pursuance of the deed such entry is not a trespass, is not prejudicial to the grantee.
2. **INSTRUCTIONS—Jury Fully Instructed.**—It is not error to refuse an instruction when the jury has been already sufficiently and correctly instructed on the point covered by the rejected instruction.

Error to a judgment of the Circuit Court of the city of Richmond in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Miles M. Martin, A. S. Bloomberg and A. B. Guigon, for the plaintiff in error.

Bryan & Williams and A. W. Patterson, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

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R. A. Patterson, defendant in error, plaintiff in the court below, brought this action in the Circuit Court of Henrico county against the plaintiff in error, the Virginia Passenger and Power Company, defendant below, as the successor in title to the rights, franchises, etc, of the Westhampton Park Railway Company, to recover damages for acts of trespass upon three separate portions of his lands, and at the trial of the cause in the Circuit Court of the city of Richmond, to which court it had been removed, recovered a verdict and judgment for fifteen hundred dollars, to which judgment a writ of error was awarded by this court.

Patterson was the owner of two certain tracts of land, two miles from the city of Richmond, at the western terminus of Grove road, the first lying partly on the north side of Grove road, running back, eastwardly, to Patterson avenue, and known as the Mitchell Place, and the second lying between the Westham, or Cary street road, and Patterson avenue, and known as the Wrenn Place, which two tracts are adjacent and constitute together a single tract of about one hundred acres. Together with other land owners in that vicinity Patterson was one of the incorporators of the Westhampton Park Ry. Co., chartered for the purpose of building an electric railway from the city of Richmond to the Green's mill property, located at a point several miles in the county of Henrico. Efforts on the part of these original incorporators to finance and construct through a certain agency the contemplated electric railway line having failed, Patterson was approached by one Robertson, on behalf of the Westhampton Park Ry. Co., with the request that he, Patterson, grant a right of way through his land, upon which to lay a track and operate electric cars between a point upon an established line near the city of Richmond and Westhampton Park, or the Green's mill property in Henrico county, and as an inducement to Patterson to accept this proposition various representations were made by Robertson as to the equipment and schedule of the proposed road, tending to encourage travel, the

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development of property along its line, and its enchancement in value. Relying upon these representations, Patterson executed a deed, conveying to the "Westhampton Railway Co." a strip of ground sixty feet in width, beginning at the Wrenn place, where the Grove road terminates, and running through the Wrenn place to the tract known as "Reveille," upon which Patterson resided. No money consideration was paid for this deed, it having been made solely in consideration of the representations made by Robertson, and the promise and agreement entered into at the time that the company constructing the railway line upon said sixty-foot strip of land would also construct a substantial driveway on both sides of its tracks, satisfactory in all respects to Patterson, with such crossings and culverts as he might require, and without injury to or material inconvenience in the use of his property.

The declaration contains three counts, charging separate acts of trespass upon three distinct portions of Patterson's property, the first alone of which did the plaintiff in error, by virtue of the deed above mentioned or otherwise have even the semblance of right to invade, the acts done upon the remaining two being wholly unauthorized.

The route first contemplated was westward from the city of Richmond upon the extension of Grove avenue and along the Grove road to Patterson's property, thence along rights of way through various tracts to what is known as the "Three Chop Road," but it was afterwards determined to run out Floyd avenue, extended, as far as that was a public highway, then along rights of way forming an extension of Floyd avenue until Patterson's property was reached, then northwardly across the eastern end of his property (the Wrenn place) to the Grove road. Lying in the way of this second selected route was the refusal of the Richmond, Fredericksburg & Potomac R. Co. to allow the proposed electric road to cross its "Belt Line" track at grade, and it was thereupon concluded to go under that road, necessitating a cut of some 14 or 15 feet, at the bottom of which water

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was encountered in such volume that it could not be overcome by use of pumps, and ditching had to be resorted to for a distance of sixteen hundred feet along the "Belt Line" track, which invaded Patterson's land, cutting it away in some portions, and in others throwing upon it embankments of earth, stones and rubbish taken from the ditch alongside, and causing other damage to his lands, without notice to or license from him.

The plea of not guilty was interposed by the plaintiff in error, and under it the trial was had upon the theory asserted as a defense—first, that plaintiff in error had the right under the deed from Patterson granting a right of way along the originally proposed route of the electric railway over certain of his lands, to construct the same as it had been constructed; and, second, that in so far as the route had been changed and other portions of Patterson's property had been touched or injured, he acquiesced, and was estopped from claiming damages for injuries resulting therefrom.

It will be observed, that upon the issues joined it was essentially a case for a jury under proper instructions from the court.

The evidence proved, or strongly tended to prove, that the deed in question had been delivered by Patterson to his son in January, 1901; that the deed contemplated the granting of a right of way from the terminus of Grove avenue directly westward through Patterson's land; that it speaks of a "map of the proposed Westhampton Park Railway Line, to be recorded simultaneously with this deed"; that the deed remained in the hands of its depository, A. W. Patterson's, for six months; that in the meantime the route of the proposed railway had been changed from Grove road to Floyd avenue extended, so that the deed which had been executed and left with A. W. Patterson by his father no longer answered the purposes of the railway company, and therefore another deed, covering the new condition, was requested of Patterson; that a plat of the route as finally laid out was submitted to A. W. Patterson by Robertson for the purpose of drafting a new deed in conformity therewith,

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and that Patterson, the father, refused to give such a deed; that Robertson then obtained the deed, here in question, from A. W. Patterson in connection with the new route, but without any intention or suspicion on the part of A. W. Patterson that Robertson was going to record the same; that with full knowledge of all these facts, and especially of the conditions upon which the deed was to become operative, and knowing further that A. W. Patterson had given him the deed without any intention or expectation that it would be recorded, Robertson took the same to the clerk's office and had it recorded, and that the plat filed for record with the deed is not the one referred to therein, and does not answer at all to the route therein described.

As to whether or not Patterson had such knowledge of the damage being done to those portions of his lands not embraced in the right of way intended to be conveyed by his deed, and so acquiesced in the alleged wrongful acts on the part of the plaintiff in error as that he should be estopped from setting up a claim for damages resulting therefrom, the evidence is all sufficient to sustain the finding of the jury, that he had no such knowledge. Therefore, as we view the case, it is only necessary to determine whether or not it was fairly submitted to the jury upon the instructions of the court.

While there are a number of questions raised and discussed at length in the petition for this writ of error, the most of which were not raised for consideration in the court below, there were but two bills of exceptions taken by plaintiff in error to the rulings of the court at the trial of the cause, the first of which relates to the instructions given and refused, and the other to the refusal of the court to set aside the verdict and grant a new trial on the ground that it is contrary to the law and the evidence, and because the damages allowed were excessive.

Both parties asked for instructions, but they were all refused, and in lieu thereof the following were given:

"The jury are instructed that plaintiff cannot recover any damages for the ditch on the land of Belt Line road, but if the

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jury believe that the ditch encroaches to any extent on the lands of plaintiff he should be allowed compensation for the actual value of the land taken, and actual damages to his adjacent land consequent upon the ditch on such strip of his land as defendants occupied beyond the Belt Line R. R. track.

“The jury are instructed that as to so much of plaintiff’s land as lies south of the Grove Avenue road extended the defendants must be regarded as trespassers, and under obligation to pay to plaintiff full compensation. The measure of that compensation must be the actual value of the plaintiff’s land taken by defendant’s road, and if the jury believe that the taking and use of this land diminished the value of plaintiff’s adjoining land more than the railway benefitted it, they should take that damage into consideration and add a reasonable estimate therefor to the actual value of the land taken.

“But if the jury believe that the plaintiff knew and, without protest against the invasion of that portion of his land, acquiesced in the construction and completion of the road the jury may infer that he accepted the consummation of defendant’s road as full compensation for any damage inflicted by defendants on that portion of his land.

“If the jury believe from the evidence that at the time when the plaintiff executed and delivered the deed of January 14, 1901, to his son, A. W. Patterson, to be done with as he thought best, he knew that the said A. W. Patterson was counsel or attorney for John C. Robertson for the purpose of acquiring rights of way to promote the building of defendant’s railway, the jury are instructed that the delivery of the deed to A. W. Patterson was a consummate delivery to the grantees, and that in the transfer of that deed by A. W. Patterson to John C. Robertson as the then representative of the defendant company, the said A. W. Patterson had no right to qualify or abate the legal rights of defendant under that deed, and that in the user for the purpose

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of their road by the defendant of so much of plaintiff's land as is embraced in the deed the defendants were not trespassers, and the plaintiff is not entitled to any damages for such taking or user.

"If the jury believe from the evidence that the plaintiff delivered the deed of January 14, 1901, to A. W. Patterson, to be held by him in escrow, and did not know at that time that the latter was attorney for John C. Robertson for the purpose of procuring rights of way for the construction of a railway, and if they further believe that the said A. W. Patterson delivered the said deed to the said Robertson without any statements of the conditions required by his father, then they are instructed that the defendant company, acting under said deed, was not a trespasser.

"But if the jury shall believe that Dr. Patterson did not know that A. W. Patterson was attorney or counsel as aforesaid and shall further believe that A. W. Patterson accompanied delivery of deed to Robertson with a statement of conditions required by his father, then they are instructed that the defendants can claim no right under the deed without compliance with such conditions."

After these instructions had been given, plaintiff in error asked for an additional instruction, numbered 4, which was also refused. It is only to the last two instructions given by the court and the refusal to give No. 4 that objection is made.

These instructions objected to relate to the evidence tending to show that the deed in question was not to be delivered to or used by the electric railway company, except upon compliance with the stipulations and conditions alleged in the declaration, and we are unable to see any ground for complaint on the part of plaintiff in error thereto, as they submit that phase of the case not only fairly to the jury but most favorably to plaintiff in error's view of the evidence. Instruction No. 4, refused, was but a repetition of a question already submitted to the jury by the instructions given, and there was no error in refusing it.

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Damages were claimed to the amount of 5,000, while the amount allowed by the jury is \$1,500, and no good reason is presented for considering this amount excessive, and none whatever occurs to us. Not only did the jury hear the evidence introduced, but had the exceptional advantage of a view of the lands involved.

We are of opinion that the verdict is in accordance with the evidence; that the damages awarded are not excessive, and that there is no error in the rulings of the Circuit Court at the trial; therefore, its judgment must be affirmed.

Affirmed.

Syllabus.

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NATIONAL COUNCIL, JUNIOR ORDER AMERICAN MECHANICS,
AND OTHERS v. STATE COUNCIL, JUNIOR ORDER UNITED
AMERICAN MECHANICS.

June 15, 1905.

Absent, Cardwell, J.

1. CORPORATIONS—*Charter Powers—Motives of Incorporators.*—The sufficiency of the motive inducing corporators to apply for a charter of incorporation is immaterial. The company stands upon its charter rights, and must prevail unless they are in conflict with the Constitution of the United States or of the State of incorporation.
2. CONSTITUTIONAL LAW—*Doubts as to Constitutionality of Statute.*—A statute will not be declared unconstitutional unless its repugnance to the Constitution be plain and palpable. If sought to be avoided on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, it must be shown that such injustice is prohibited, or such rights guaranteed or protected by the Constitution; if on the ground that the statute violates the fundamental principles of republican government, it must appear that those principles are placed beyond legislative encroachment by the Constitution. Nor are courts at liberty to declare an act void, because in their opinion it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words.
3. FOREIGN CORPORATIONS—*Exclusion From State.*—A State may exclude altogether a foreign corporation from doing business within its limits, or exact such security for the performance of its contracts with its citizens as it may deem proper, where such foreign corporation is not in the employment of the Federal government, nor engaged in interstate or foreign commerce.
4. CORPORATIONS—*Benevolent Associations—Incorporation—Vested Rights—Case in Judgment—Constitutional Law.*—An Act of Assembly incorporating a benevolent and patriotic association (which had previously done business in the State by comity) and granting to it the exclusive right

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to create and organize subordinate bodies, and which is wholly prospective in its operation and does not purport to deal with existing rights of property, is not in conflict with the Constitution of this State or of the United States. The State has the right to give to a corporation created by it for the conduct of such a business the exclusive right to create and organize subordinate bodies.

5. *EQUITY—Jurisdiction—Property Rights—Exclusive Charter Privileges—Foreign Corporations.*—Generally courts of equity protect rights of property only, and leave to courts of law the protection of merely personal rights, but property rights may arise under a charter granted by the Legislature, and these rights are within the pale of protection of a court of equity. The exclusive right to organize subordinate bodies to raise funds for a benevolent purpose does or may involve rights of property within the protection of a court of equity, and it does not follow that a State may not prohibit a foreign corporation from coming within its borders for this purpose.

Appeal from a decree of the Chancery Court of the city of Richmond. Decree in favor of complainant. Defendants appeal.

Amended and Affirmed.

The opinion states the case.

Charles V. Meredith, J. C. Weckert and G. W. Crumpecker,
for the appellants.

Samuel A. Anderson and Frank W. Christian, for the
appellee.

KEITH, P., delivered the opinion of the court.

The bill of appellee avers that the State Council of Virginia, Junior Order United American Mechanics, a corporation, was chartered by act of Assembly in February, 1900; its objects being to maintain and promote the interests of Americans, to assist them in obtaining employment, to encourage them in business, to afford relief to the members and their families in case of accident, sickness or death, and to defray the expenses of their funerals or such other cases of distress as shall be defined by the constitution, by-laws, rules and regulations of the

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corporation. Before its incorporation it existed as an unincorporated organization, under the same name, and was subject, by virtue of the customs of the order, to the control of the National Council of the Junior Order of United American Mechanics of the United States, in so far as the latter acted within the scope of its objects, charter, constitution, and laws.

In the year 1869 the State Councils of Pennsylvania, New Jersey and Delaware, which were benevolent and patriotic organizations, met and created the National Council, and delegated to it certain rights and powers, within which it should be regarded and respected as the supreme head of the order. The objects of the National Council were, first, to maintain and promote the interests of Americans, and shield them from the depressing effects of foreign competition; second, to assist Americans in obtaining employment; third, to encourage Americans in business; fourth, to establish a sick and funeral fund; fifth, to maintain the public school system of the United States of America, and to prevent sectarian interference therewith, and to uphold the reading of the Holy Bible therein. To these objects, fixed by the charter, and existing also before the incorporation of the order, there was added in the year 1897, the additional object—sixth, to establish or erect an orphans' home for the orphans of deceased members of the order, and to maintain the same.

The National Council, about the time of its organization in 1869, adopted a constitution and certain general laws for the promotion of its objects.

The bill then goes on to detail the provisions of the constitution, especially with reference to its amendment, and sets out that in disregard of its fundamental law the National Council had undertaken to engraft upon it certain features, with reference to insurance, to the regalia of the order, to a national judiciary for the final decision of all matters of controversy arising in the order, and for a change of representation. The contention of complainant is that these changes were not made in

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accordance with the mode prescribed by the constitution for its own amendment, and that they are "unconstitutional, illegal, and revolutionary measures"; that they were adopted without the approbation and against the wishes of the councils of Virginia, both State and subordinate, and against the wishes and approbation of at least two-thirds of the membership of the order; and that complainant has exhausted all lawful means within the order to obtain a redress of its grievances, but without success.

On February 17, 1900, the General Assembly of Virginia gave a charter to the State Council of Virginia, which at a special meeting of that Council, called in accordance with the laws of the order, convened in Richmond on March 14, 1900, and by a vote of 86 in the affirmative to 17 in the negative accepted the charter and became an incorporated body.

The following are the salient features of the charter: First, it embraces all of the members of the State Council of Virginia, Junior Order United American Mechanics; second, the State Council is made the supreme head of the order in Virginia; third, it is given full and exclusive authority and jurisdiction to grant charters to subordinate Councils and to make such constitutions, by-laws and rules of the order as it may deem just and proper for the government of subordinate Councils.

The bill states that certain persons who are named and others, unknown, in March, 1901, at Alexandria, Virginia, organized a new State Council of Virginia, by substantially the same name as that of complainant. This new organization denies that the plaintiff is the supreme head of the order in Virginia, and the validity of its charter, and is doing everything in its power to destroy the plaintiff, and to prevent its successful operation under its charter. It is further stated that the new State Council was organized for substantially the same purposes as those for which the complainant was organized and was afterwards chartered, and for the promotion of the objects which the plaintiff declares to be illegal and unconstitutional, and wholly foreign

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to the objects of the order; that complainant has adopted a seal, and that the Alexandria organization has adopted substantially the same seal. The prayer of the bill is that the National Council of the Junior Order of United American Mechanics of the United States of North America, E. L. S. Bouton, James R. Mansfield, and a number of other individuals whose names are given, and others described as unknown, may be made parties to the bill; that the Alexandria organization may be declared illegal, and the plaintiff be held valid; and that the defendants may be enjoined from continuing the use of the name State Council of Virginia, Junior Order United American Mechanics of the State of Virginia, etc., and from the use of the seal, and from carrying out the objects for which they were organized; that they may be enjoined from granting charters to subordinate councils and representing themselves to subordinate councils as the head of the order in this State, and from interfering in any way with the pursuance by the complainant of its object and purposes.

To this bill the defendant, the National Council, filed its demurrer and answer, in which the private individuals named in the bill unite. The answer traverses all the material averments of the bill, maintains the legality of the changes made in the objects and constitution of the National Council of which the bill complains, and alleges that the act of the Legislature by which the plaintiff was incorporated is in violation of the Constitution of the United States, in that its effect would be to impair the obligation of a contract, and deprive the defendant of property without due process of law.

We shall not enter into a consideration of the charge made in the bill and denied in the answer, that the several changes in the objects and the constitution of the National Council were not made in conformity with the mode prescribed by the constitution itself for its own amendment, and are therefore void. They constitute the motive which induced the State Council of Virginia to apply to the Legislature and obtain from it a char-

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ter, which, if valid is conclusive of this controversy. The sufficiency of the motive inducing the plaintiff to apply for the charter is immaterial. It stands upon its charter rights and must prevail, unless the contention of the defendants, that it is repugnant to some provision of the Constitution of the State, or of the United States, can be maintained.

The rule governing courts in passing upon the constitutionality of a law is no longer to be controverted. A statute is not to be annulled unless its repugnancy to the Constitution be palpable and plain. Upon this all the courts speak with one voice, and none more forcibly than the Supreme Court of the United States.

In *Fletcher v. Peck*, 6 Cranch. 128, 3 L. Ed. 162, Chief Justice Marshall said: "Whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." See 1 Tucker on Constitutions, sec. 184; Cooley on Const. Lim. (7 Ed.), p. 228.

So it has been held that a court will not declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution. It is true there are some reported cases, in which judges have been understood to intimate a doctrine different from what is here asserted; but it will generally be found on an examination of those cases, that what

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is said is rather by way of argument and illustration, to show the unreasonableness of putting upon constitutions such a construction as would permit legislation of the objectionable character then in question, and to induce a more cautious and patient examination of the statute, with a view to discover in it, if possible, some more just and reasonable legislative intent, than as laying down a rule by which courts would be at liberty to limit, according to their own judgment and sense of justice and propriety, the extent of legislative power in directions in which the Constitution had imposed no restraint." Cooley on Const. Lim. (7 Ed.), p. 233.

Nor, says the same author, can the courts declare statutes void "because they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that those principles are placed beyond legislative encroachment by the Constitution. The principles of republican government are not a set of inflexible rules, vital and active in the Constitution, though unexpressed, but they are subject to variation and modification from motives of policy and public necessity; and it is only in those particulars in which experience has demonstrated any departure from the settled practice to work injustice or confusion, that we shall discover an incorporation of them in the Constitution in such form as to make them definite rules of action under all circumstances. . . .

"Nor are the courts at liberty to declare an act void, because in their opinion it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words." Cooley (7 Ed.), pp. 237 *et seq.*

For, "when the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature, we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument." *People v. Fisher*, 24 Wend. 215.

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The act which in the case before us we are asked to declare to be an unconstitutional exercise of power, appears in the form of a charter granted to the State Council of the Junior Order of United American Mechanics by the Legislature on the 17th of February, 1900. It declares that certain persons therein named shall constitute a body politic and corporate, giving its name and style, and conferring upon it the powers and attributes ordinarily incident to a corporation. By the third section of this charter it is provided that the said corporation shall have full and exclusive authority and jurisdiction to grant charters to subordinate councils, Junior Order United American Mechanics, in the State of Virginia, with power to revoke the same for cause; to make such constitutions, by-laws and rules of order as said corporation may deem just and proper for the government of said subordinate councils. The charter is prospective in its operation. It does not undertake, as we construe it, to deal with vested rights. It interferes with no right of property. It leaves the whole order of things as it existed with respect to the society known as the Junior Order United American Mechanics unaffected and all rights of persons and property which had been acquired under that organization undisturbed and unaffected, except that it declares that the corporation created by the act shall have full and exclusive authority and jurisdiction to grant charters to subordinate councils in the State of Virginia.

We have been unable to ascertain what contract right is impaired or what provision of the Constitution, either of the United States or of the State of Virginia, is violated by this charter. It is true that prior to its passage the National Council, the appellant in this case, had authority, by permission of the State, to organize subordinate councils and to transact the business of the order within the limits of the Commonwealth; but since the decision of *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, we had supposed that there was no longer any doubt

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that a State may exclude a foreign corporation entirely from doing business within its limits, or exact such security for the performance of its contracts with its citizens as in its judgment would best promote the public interest.

In that case the plaintiff in error, as agent of a New York insurance company, was indicted in a State court for issuing a policy without license, as required by the statutes of the State. The validity of the law having been affirmed by the State courts, a writ of error was awarded by the Supreme Court of the United States. The constitutionality of the Virginia statutes was assailed as being in conflict with that clause of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States, and to the provision that Congress shall have power to regulate commerce among the several States.

In answer to the first contention, Justice Field, speaking for a unanimous court, and reviewing all the decisions beginning with *Bank of Augusta v. Earle*, 13 Peters 586, 10 L. Ed. 274, concludes, that "the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their Constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given. . . . The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 'It must dwell in the place of its creation and cannot migrate to another sovereignty.' The recognition of its existence even by other

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States, and the enforcements of its contracts made therein depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy.”

Proceeding to the second objection urged to the validity of the Virginia statute, which was founded upon the commerce clause of the Federal Constitution, Justice Field said: “At the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. . . . This state of facts forbids the supposition that it was intended in the grant of power to Congress, to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations and corporations. There is, therefore, nothing in the fact—that the insurance companies of New York are corporations—to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not

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constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

"The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal Government, or where its business is strictly commerce, interstate or foreign." *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650.

We think no argument is necessary to show that the appellant is in no sense an agency or in the employment of the Federal Government, or that its business does not in any respect appertain to interstate or foreign commerce.

We are of opinion that the charter granted by the Legislature is in no respect repugnant to the Constitution of the United States, or of the State of Virginia, but is a valid exercise of legislative power. This conclusion is decisive of the case. Upon it the whole controversy hinges, and in answering it we have disposed of every contention made in the record which requires to be answered.

There is one view of the case, however, urged in the oral argument, to which we shall advert. On behalf of appellants it is urged that equity only protects rights of property, and that, in general, it leaves it to the courts of law to protect merely personal rights.

On behalf of appellee, it is claimed that the inhibitions of the Constitution of the United States apply to contracts which involve rights of property. And thereupon counsel for appellants seek to impale their adversary upon the horns of this dilemma. If property rights are involved, the act of the Legislature impairs a contract with respect to them and is void; if property rights are not involved, then a court of equity has no jurisdiction, and appellee was wrongfully in court.

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Property rights may arise, indeed may have arisen, under the charter granted by the Legislature, and those rights are within the pale of the protection afforded by a court of equity. The exclusive authority to organize subordinate councils to raise funds for the relief of members of the order and their families, in case of accident, sickness, or death, to defray the expenses of their funerals, or such other cases of distress as shall be defined by the constitution, by-laws, rules and regulations of the corporation, do or may involve rights of property within the protection of a court of equity; but it does not follow that a State may not prohibit a foreign corporation from coming within its borders for such purposes.

We do not understand the decree complained of to interfere with any vested right of person or property, but in order to put the matter beyond the reach of controversy we shall so amend the decree as to provide that nothing therein contained shall in any wise affect any such right as may have accrued prior to the 17th of February, 1900; and as amended the decree complained of is affirmed.

Amended and affirmed.

Statement.

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F. T. BLANCHARD COMPANY v. SIMON AND ANOTHER.

June 22, 1905.

1. **PARTNERSHIP—Dissolution—Use of Partner's Name in New Business—Unfair Competition.**—Upon dissolution of a partnership a partner has the right to use his own name (which had been previously used in the firm business) in connection with his own business, and an intention to divest himself of this right will not be readily presumed, but must be clearly shown, and this rule is not altered by the addition of a word to indicate the nature of the business, or the addition of the word "company" to indicate that there was more than one in the concern, although, with the additions, the name of the new concern is the same as the old, unless the public is thereby misled, or the rights of others encroached upon. The evidence in the case in judgment does not make out a case of unfair competition.

An appeal from a decree of the Corporation Court of the city of Bristol in two chancery suits heard together. Decree in favor of Ida V. Simon complainant in one of the suits, and one of the defendants in the other. F. T. Blanchard and the F. T. Blanchard Co., defendants in one of the suits and complainants in the other, appeal.

Affirmed.

The opinion states the case.

Bullitt, Kelly & Hull and *A. H. Blanchard*, for the appellants.

Peters & Lavinder and *J. S. Ashworth*, for the appellees.

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HARRISON, J., delivered the opinion of the court.

This is an appeal from a final decree in two causes heard together by the Corporation Court for the city of Bristol. The object of the first cause of "*F. T. Blanchard Company v. H. J. Simon, &c.*," was to enjoin H. J. Simon and Joseph Gutman from the use of the name, "Simon Auction Company," and to recover of them damages for having wrongfully used such name. The second cause was an attachment proceeding in equity in the name of "*Ida V. Simon v. F. T. Blanchard Company*," to recover from the defendant a note for \$1,250.

In the first named cause a temporary injunction was granted, and upon the final hearing that injunction was dissolved and the bill dismissed. In the second cause, by the same decree, the complainant recovered the amount of the note sued for, and a lien was declared in her favor, for that recovery, upon the real estate attached.

It is conceded that the decision of both causes hinges upon the right of the complainant in the first named cause to the relief therein sought.

In April, 1896, F. T. Blanchard and H. J. Simon entered into a partnership agreement to carry on a mercantile business in the city of Bristol, under the firm name and style of the "Simon Auction Company." After doing business together for some five or six years, they had a settlement of their partnership affairs, Blanchard agreeing to pay Simon \$2,500.00 for his interest in the concern, evidenced by two notes for \$1,250.00 each. Subsequently Blanchard organized a joint stock company, called "F. T. Blanchard Company" for the conduct of a mercantile business on a very much larger scale, and transferred all the business and assets of the "Simon Auction Company" to the "F. T. Blanchard Company." In this bill of sale Blanchard undertakes to transfer to his new company, which was practically himself, the right to the name "Simon Auction Co." Several months later H. J. Simon and Joseph Gutman

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associated themselves together under the firm name of "Simon Auction Company." It is this use of the old firm name of "Simon Auction Company" that the F. T. Blanchard Company seeks to enjoin as injurious to its business, and in violation of its rights.

It has been held, and we think properly, that the right of a man to use his own name in connection with his own business is so fundamental that an intention to entirely divest himself of such right and transfer it to another will not readily be presumed, but must be clearly shown. Where it is so shown, the transaction will be upheld, but it will not be sustained upon doubtful or uncertain proof. *Hazelton Boiler Company v. Hazelton Tripod Boiler Company* (Ill.), 30 N. E. 339; *Ranft v. Reimers*, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291.

The evidence in this case wholly fails to establish the claim that H. J. Simon ever, at any time, expressly or by implication, divested himself in favor of F. T. Blanchard of the use of his name in business, or ever by contract transferred to F. T. Blanchard the exclusive use of the name "Simon Auction Company." On the contrary, all the circumstances surrounding the transaction tend to negative the assumption that any property in the trade name of "Simon Auction Company" was within the contemplation of the parties. F. T. Blanchard having acquired no right to use the name "Simon Auction Company," he had no power to transfer any property in such name to the F. T. Blanchard Company. H. J. Simon clearly had the right to go into business in his own name and no reason is perceived why he could not do so with the addition of the term "Auction," which identifies his business; and the word "Company," which indicated that there was more than one in the concern, unless in so doing he misled the public or encroached upon the rights of the complainant. *Iowa Seed Co. v. Dorr*, 70 Ia. 481, 30 N. W. 866, 59 Am. Rep. 446.

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The mere fact that the F. T. Blanchard Company claims to be the successor of a firm of the same name should not, it seems to us, deprive H. J. Simon of the right to do business in the name of "Simon Auction Company."

The record discloses no sufficient ground upon which to rest a judgment for damages against Simon and Gutman for their use of the name "Simon Auction Company," during the brief period they did business under that name. Simon and Gutman did an auction business, buying and selling second hand goods in a small unpretentious store. The F. T. Blanchard Company carried on a very large mercantile business in another part of the city, and did not conduct an auction business, nor buy and sell second hand goods. The use of the name "Simon Auction Company" did not operate to produce an unfair competition in business between the parties litigant, to the prejudice of the F. T. Blanchard Company. On the contrary, it satisfactorily appears that Simon and Gutman were particular in calling attention, by advertisement, to the character and location of their business, and do not appear to have had any intention of deceiving the public or defrauding the complainant of any trade to which it was entitled. Indeed, it is difficult to see how a purchaser could have bought from Simon and Gutman believing he was buying from the F. T. Blanchard Company.

For these reasons the decree appealed from must be affirmed.

Affirmed.

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Wytheville.

HURT, COMMITTEE, v. CITY OF BRISTOL.

June 22, 1905.

1. **TAXATION—*Situs of Property of a Lunatic.***—The choses in action of a lunatic in the hands of his committee and about which there is no litigation, are taxable at the place of residence of the committee and not that of the lunatic. Sections 2700 and 492b of the Code of 1904 only apply to such fiduciaries as represent the court, and provide the means by which the court holds and controls the fund in its charge.
2. **TAXATION—*Property of Lunatic—Situs—Erroneous Assessment—Time for Correction.***—Section 571 of the Code providing for the correction of an erroneous assessment of personal property within two years has no application to the improper assessment of the estate of a lunatic at the place of his domicile instead of the domicile of his committee, and such impropriety or error may be corrected when the tax is sought to be enforced although the two years provided for by Sec. 571 has expired.

Upon a summons on suggestion in the Corporation Court of the city of Bristol. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Fulkerson, Page & Hurt, for the plaintiff in error.

J. S. Ashworth, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

The principal question presented in this case is, whether certain choses in action, held by plaintiff in error, whose residence

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or domicile is at Abingdon, Washington county, but who was appointed and qualified in the Corporation Court of the city of Bristol as committee of one Lewis W. Lancaster, a lunatic, now in the State of Tennessee, his last place of residence in the State of Virginia having been in Bristol, are taxable in the city of Bristol, or in the county of Washington.

It appears that the plaintiff in error held the choses in action referred to against certain residents of Bristol, and that the funds held by him had not been assessed with taxes for the years 1901 and 1902 in the district in which he resides, or in any place; that there is no suit or other proceeding in the Corporation Court of Bristol, or in any other court, in which the funds, held by the plaintiff in error, are being administered; and that these funds were assessed for city taxes for the years 1901 and 1902 by the commissioner of the revenue of the city of Bristol upon the report of the examiner of records of said city, pursuant to section 3326a of Va. Code, 1904, which assessments were upheld by the judgment of the Corporation Court of that city, to which this writ of error was awarded.

Section 3326a, *supra*, provides that the examiner shall examine the papers in all pending causes in the courts in his circuit and the records of such courts, "and ascertain what money, bonds, notes, stocks, shares of stock, capital, capital stock, choses in action, or other evidences of debt . . . subject to taxation are held by any receiver, commissioner, or fiduciary, or under the control of said courts; or are held by any person, bank or corporation subject to the order of such courts," and forthwith make report thereof to the commissioner of the revenue of the county, city, or town "for which such examination is made, or in which said property is taxable," and thereupon it is made the duty of such commissioner of the revenue to enter upon his personal property books the names of the persons mentioned in such report and the aggregate amount of property chargeable to each of them, as stated therein, and to extend the taxes thereon, etc.

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Section 491 of Va. Code, 1904, provides that the commissioner of the revenue shall ascertain and assess all subjects of taxation in his county, district, or city; and section 492 provides that if the property be owned by a person *sui juris* it shall be listed by or taxed to him, and further provides that property owned by a lunatic shall be listed by and taxed to his committee.

The authorities are agreed that the *situs* of a chose in action for purposes of taxation is at the domicile of the creditor, and not at that of the debtor, no matter where property, upon which the debt may be secured, is situated.

Section 1702 of Va. Code, 1904, defining the duties and powers of committees, provides that the committee of an insane person shall be entitled to the custody and control of his person (when he resides in the State, and is not confined in a hospital or jail), shall take possession of his estate, and may sue and be sued in respect thereto, and for the recovery of debts due to or from the insane person. He shall take care of and preserve such estate and manage it to the best advantage; shall apply the personal estate, or so much as may be necessary, to the payment of the debts of such insane person, and the rents and profits of the residue of his estate, real and personal, and the residue of the personal estate, or so much thereof as may be necessary, to the maintenance of such insane person and of his family, if any; and shall surrender the estate, or so much as he may be accountable for, to such insane person, if he shall be restored to sanity, or the real estate to his heirs or devisees and the personal estate to his executors or administrators in case of his death without having been restored to sanity.

While it is the duty of a committee to render his accounts annually before a commissioner of the court in which he qualified, it will be seen from the statute just quoted that he has absolute control and management of the lunatic's estate, and that section 2700 of the Code, which authorizes the court to order money in the hands of any fiduciary to be invested or

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loaned out, or make such other order respecting the same as may seem to it proper, and section 492b relative to the payment of taxes on funds under the control of a court, have no application to funds in the hands of a committee or other fiduciary who is the representative of, or holds the estate of, a person under disability, such fiduciary being at all times liable for interest upon the annual balances in his hands. Said sections only apply to such fiduciaries as represent the court and are the means by which the court holds and controls the fund in its charge.

Sections 2686 and 2687, also cited for defendant in error, have no sort of bearing upon the question under consideration.

By section 491, *supra*, it is made the duty of the commissioner of the revenue to call on every person in his county, district, or city to furnish a list of such property, money, credits, or other subjects of taxation, as required by law, and the value thereof, and clearly the statute contemplates that such commissioner should apply to the person liable to taxation at the place of his domicile, and not elsewhere.

We are of opinion that the *situs* of the funds held by plaintiff in error, for taxation, is in the county of Washington, where he resides, and not in the city of Bristol.

It is contended, however, for defendant in error, that defense to the assessment complained of could only have been made under section 571 of the Code, and two years having elapsed after the assessment was made and before this defense was set up in this cause, it cannot be made at all. We do not think that this section has any application whatever to the case. *Non constat*, plaintiff in error knew of the assessment against him in the city of Bristol until served with notice of this garnishee proceeding, in which it is sought to collect the taxes assessed.

The judgment of the Corporation Court of Bristol must be reversed and annulled, and this court will enter such order as that court should have entered.

Reversed.

Statement.

Wytheville.

VIRGINIA IRON, COAL & COKE CO. v. LORE.

June 22, 1905.

1. **MASTER AND SERVANT.—Safe Place—Warning—Change of Rules During Servant's Absence.**—If a former servant returns to the employment of the master, and during his absence rules which formerly existed for the protection of servants have been abrogated, it is the duty of the master to publish new rules, or else to warn the servant of the dangers to which he will be subjected.
2. **MASTER & SERVANT—Complex Business—Publication of Rules—Warnings.**—Where two companies are engaged in operating steam engines and cars upon the same tracks in the same yard, running backwards and forwards, at all hours of the day and night, the business is of such complex nature that they should promulgate rules for the protection of their employees in the discharge of their duties, and the failure to do so is such negligence as to render them responsible for the injuries resulting therefrom.
3. **NEGLIGENCE—Case at Bar—Leaving Switch Open—Demurrer to Evidence.**—Whether or not leaving a switch open in the yard of a furnace company by those in charge of the yard engine until the return of the engine from its trip, in accordance with a custom of doing business, was, in the absence of any rule on the subject, negligence on the part of those in charge of the engine, was, under all the facts and circumstances of the case, a question for the jury, and as they might have found that it was not, it was the duty of the trial court, on a demurrer to the evidence, to so find.

Error to a judgment of the Corporation Court of the city of Bristol in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

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P. H. C. Cabell and R. E. Cabell, for the plaintiff in error.

A. H. Blanchard, H. W. Sutherland and R. E. Burson, for the defendant.

BUCHANAN, J., delivered the opinion of the court.

H. C. Massie, whilst in the service of the Virginia Iron, Coal and Coke Company, lost his life, and this action was brought by his personal representative to recover damages therefor, upon the ground that his decedent's death was caused by the negligence of that company.

Upon the trial of the cause the defendant company demurred to the evidence, which demurrer was overruled by the court and a judgment rendered in favor of the plaintiff for \$3,000. To that judgment this writ of error was awarded.

It appears that the defendant company was the owner of a large furnace for the manufacture of iron, located in the city of Bristol. Attached to the furnace was a large yard, in which are tracks and switches belonging to and used by the company in hauling material and refuse from one part of the yard to another. By some arrangement with the furnace company, the nature of which is not shown by the record, the Virginia and Southwestern Railway Company, with its own locomotives, cars, and employees, delivered materials and supplies upon the defendant company's yard for use at its furnace. The map or diagram on opposite page shows generally the location of the furnace, its yard, tracks and switches, the point where the railway company entered the yard, and the point where the plaintiff's decedent lost his life.

On the evening before the accident, which occurred just before day the next morning, the defendant company employed the plaintiff's decedent to aid in hauling slag from the furnace to the dumping ground in its yard. The machinery used for that purpose was a slag pot, or ladle, on wheels, and a small



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steam engine called a "dinkey." The engineman and his helper, the plaintiff's intestate, known as the "potman," had been operating this machine the night preceding the accident, and were returning from the tipple track toward the main furnace track, slag pot in front, when they were, without warning, run into by the cars of the Virginia and Southwestern Railway Company, which were being pushed into the yard, and the plaintiff's intestate killed.

The grounds of negligence upon which the plaintiff bases his right to recover are, that the defendant company failed to warn his decedent of the dangers attending his employment, and had no rules defining the manner in which its work was to be done for the purpose of protecting its employees.

It appears that no warning or instruction was given the decedent, and that the defendant had promulgated no rules. The contention of the defendant company is that the decedent needed no warning, because when employed he represented that he had worked before in this same capacity, and that, although the defendant company had promulgated no rules, the rules of the railway company governing its employees in running its locomotives and cars upon the furnace yard were sufficient for the protection of the employees of the defendant company. It appears that the furnace had been in operation for four or five years, and that the decedent had worked at or about the furnace "off and on" ever since it was built, and that when employed the evening before his death he was asked if he had ever worked in that capacity before, and his reply was that he had.

If he had worked as "potman" at the defendant company's furnace before his last employment, and the dangers attending that work were no greater than when he had formerly worked there, no further instruction or warning was necessary. The decedent's mother, who lived near the furnace, testified positively that her son had never worked in that capacity at that furnace. It further appears that the decedent had been absent from Bristol and had only returned the day before his death.

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Prior to that time, how long does not appear, the rules of the railway company made it the duty of its employees, and the practice was, before running its locomotives and cars into the yard of the defendant company, to sound certain blasts of the whistle, and to get reply blasts from the "dinkey" engine of the defendant company. At the time the accident occurred the city of Bristol was enforcing its ordinance prohibiting whistling in the yard, and the rule referred to above was no longer in force. It appears that the decedent knew that the railroad company's locomotive and cars might be sent into the defendant company's yard at any time during the day or night, but the record does not show that he knew that the rule or practice referred to was no longer in force, or that they could be brought into the furnace yard without sounding whistle or bell.

After the abrogation of that rule of the railway company, if not before, it was clearly the duty of the defendant company to promulgate rules for the protection of its employees upon its yard, used as it was by the railway company. Two companies operating steam engines and cars upon the same tracks in the same yard, running backwards as well as forwards, at all hours of the day and night, were engaged in such a complex business that, in the exercise of reasonable care, they should have foreseen and anticipated that unless they promulgated rules for the protection of their employees in the discharge of their duties, a collision like that which did occur was not only probable, but inevitable. Failure to promulgate rules under such circumstances is such negligence as renders them responsible for injuries resulting therefrom. *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232; *Moore Lime Co. v. Richardson*, 95 Va. 326, 335, 28 S. E. 334, 64 Am. St. 785; *N. & W. Ry. Co. v. Graham*, 96 Va. 430, 434, 31 S. E. 604; 1 Labat on Master and Servant, ss. 210, 211.

The railway company recognized its duty in this respect, and, until the abrogation of the rule requiring its employees to give notice when they were going to enter the defendant company's

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yard with engines and cars, and to get a reply from the dinkey engine, its rules seem to have been sufficient; but upon the abrogation of that rule its only rules were the general railway rules which govern when entering its own yards—viz.: not to use excessive speed in the yard, to keep the switches properly set, and to have on the front end of the train in the daytime a man stationed, and at night a lantern.

It does not appear that the decedent had ever been a railway employee, or knew anything about the rules or practices which governed the railway company's employees at the time of the accident.

Under the facts and circumstances of the case, we are of opinion that the defendant was guilty of negligence in not promulgating rules for the protection of its employees, and, since it had no such rules, in not warning the decedent of the dangers attending his work as "potman" from the use of the defendant company's yard by the railway company.

The defendant company insists that, even if it were guilty of negligence, the proximate cause of the accident was the negligence of the decedent and his fellow-servant, the engineman, in leaving the switch open when they went upon the tippie track with the "dinkey" engine and slag pot.

The evidence of the engineman proves that it was the habit or custom to leave the switch open when they went out with slag, and to close it when they returned to the main track. Whether or not leaving the switch open, in accordance with that custom, in the absence of any rule on the subject, was contributory negligence, was, under all the facts and circumstances of the case, a question for the jury, and as they might have found that it was not, the Circuit Court did not err in so holding.

We are of opinion that upon the whole case, there was no error in the judgment complained of and that it should be affirmed.

Affirmed.

Statement.

Wytheville.

CONTINENTAL CASUALTY COMPANY V. PELTIER.

June 22, 1905.

1. **ACCIDENTAL INSURANCE—Proximate Cause of Death—Disease—Supervening Accident.**—The evidence in this cause shows that the deceased upon whose life there was an accident policy, died of typhoid fever three weeks after receiving a personal injury such as was covered by the policy; that two weeks before the fever developed he had so far recovered from the injury as to be able to walk about and travel on the railroad, riding part of the way in the caboose of a freight train and saying that he was getting on finely and expected to go back to work in a few days.
Held: There was no necessary or natural connection between the injury and the disease of which decedent died, and there can be no recovery on a policy insuring against bodily injuries effected through external, violent and purely accidental causes which should *solely and independently of all other causes necessarily result in his death*, within ninety days from the date of the accident.
2. **INSTRUCTIONS—Incompleteness.**—In order that an incomplete statement of the law in one instruction may be cured by a complete statement of it in another it must appear that when the instructions are read together the jury could not have been misled by the incomplete instruction.
3. **INSTRUCTIONS—Conflict—Directing Verdict.**—If an instruction directing a verdict leaves out of consideration an essential view of the case, and is in conflict with another instruction, a verdict in accordance with such first mentioned instruction should be set aside, as it is impossible for the court to say whether or not the jury were controlled by the erroneous instruction.

Error to a judgment of the Corporation Court of the city of Bristol in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Reversed.

Opinion.

The opinion states the case.

Bullitt & Kelly and *W. F. Rhea*, for the plaintiff in error.

W. H. Rouse, H. N. Bell and *A. H. Blanchard*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

The defendant in error, plaintiff in the court below, brought this action to recover the sum of \$1,500.00, the amount of a policy of insurance issued by plaintiff in error to William Peltier, payable to defendant in error, his wife, within a stipulated time after his death caused by accident, and the verdict and judgment in the court below was for the defendant in error for the amount of the policy, which judgment we are asked to reverse because of misdirection of the jury by the instructions given at the trial, and because the verdict is contrary to the law and the evidence.

William Peltier held what is known as an accident insurance policy, whereby plaintiff in error bound itself, among other things, to pay to his wife, defendant in error, the sum of \$1,500.00 "*in the event of personal bodily injuries effected . . . through external, violent, and purely accidental causes, and if such injuries should solely and independently of all other causes necessarily result in his death within ninety days from the date of said accident.*"

There were numerous other provisions in the policy, but they are immaterial to the issue in this case.

On the 12th of June, 1903, William Peltier, whilst engaged as a freight conductor on the Va. & S. W. R. R., received, in a railroad accident, injuries of the character contemplated in the policy, and as the result thereof was confined to his bed from the date of his injury until some time shortly before the 1st day of July following—the time of his actual confinement being variously estimated by the witnesses as from ten days to three

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weeks. At all events, the fact is undisputed that on the 1st day of July, 1903, he applied in person at the office of the superintendent of the Va. & S. W. R. R. Co. in Bristol for a pass to use on a trip to Big Stone Gap, presumably walking from his home, also in Bristol, to the superintendent's office, and certainly walking up two flights of stairs from the street to the third story of the office building. On the 3rd day of July he used the pass and went to Big Stone Gap, and on July 5th returned to Bristol, riding part of the way on a freight train, climbing into and getting off the freight caboose without difficulty, and telling his fellow-trainmen that he was getting on finely, expected to go back to work in a few days, etc. July the 18th or 19th, nearly three weeks after he had gotten up from his injuries, and had been going about, he went to the office of Dr. T. F. Staley, a reputable and competent physician, who had attended him and treated his injuries, and complained of headache and other symptoms. After examining him, Dr. Staley told him that he was threatened with typhoid fever, and advised him to go home and go to bed, which he did. On the next day Dr. Staley saw him again, and found that his fears, as expressed the day before, were well founded, and visited him thereafter every day, and sometimes as often as three times during the day, treating him all the while for typhoid fever, until the patient died on the 16th day of August, 1903.

During the period between the 18th of July and the 16th of August a physician of high standing in Bristol, who had been called in consultation with Dr. Staley, saw the patient twice, once about the 22nd of July, and again some two weeks later, and fully agreed with Dr. Staley in his diagnosis of the case.

It was the contention of defendant in error at the trial, that the death of William Peltier was the direct result of the injuries he received on the 12th of June, 1903; while plaintiff in error contended that typhoid fever caused his death, that there

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was no natural and necessary connection between his injuries and the disease, and that, in any event, his injuries were not such as to, and did not, "*solely and independently of all other causes necessarily result in death.*"

After the evidence had been introduced, the court gave to the jury two instructions at the instance of defendant in error, and over the objection of plaintiff in error. The first told the jury "that if they believed from the evidence that William Peltier, on the 12th day of June, 1903, received personal, bodily injuries from external, violent, and purely accidental causes, and as the direct result of such injuries as an exciting cause some disease was caused to set up in the body of William Peltier, which would not have happened or existed but for said injuries, and from which disease, caused as aforesaid, the said William Peltier died on the 16th of August, 1903, that in such case the said injuries would be the proximate cause of the death, and the defendant would be liable therefor under said policy.

"Where death results from any disease or cause which is the direct result of the injury, and which would not have happened but for the injury, in contemplation of law the original injury from which the intervening cause or disease springs, and without which it would never have existed, is the cause of the death."

This instruction is plainly erroneous. There is no evidence whatever in the record tending to prove that William Peltier had any disease except typhoid fever. Defendant in error, her father, and Dr. Staley testify as to the exact character and extent of his injuries. The first two describe the kind and location of the injuries very much as Dr. Staley does, as being a fracture of the ninth and tenth ribs, bruises on the left side and hip and right knee, though the former refer to some symptoms and complaints confined chiefly to the first few weeks, which Dr. Staley says were not noticed by or known to him.

It is not controverted that typhoid fever is caused by a germ; that there is no necessary or natural casual connection

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between such injuries as the deceased had sustained and the disease; and that the one could not produce the other. Dr. Edwards, introduced for defendant in error as an expert, does testify that if a man was injured so as to lower his vitality "it would rather increase his liability to take typhoid fever," but adds that a man could not take it without first having his system impregnated with the germ, and that there is no necessary and natural connection between an external injury and this disease. Upon this point all of the physicians testifying in the case are agreed, so that there was no evidence to warrant the jury in finding, as the instruction told them they might, that the disease from which William Peltier suffered and may have died was the direct result of the injuries he had sustained as an exciting cause, and which would not have happened or existed but for his injuries. The instruction was well calculated to mislead the jury into conjecture and speculation as to whether William Peltier died of his injuries, or from disease, or from both concurring.

But conceding that Dr. Edwards' evidence tended to prove that Peltier, by reason of his injuries, might have contracted the disease more readily than he would otherwise have done, the instruction ignores the plain provision of the policy sued on, that it covers only injuries which "*solely and independently of all other causes necessarily result in death,*" and erroneously assumes that the injuries alone caused the disease.

In *Nat'l. M. Acc. Ins., &c., v. Shyrook*, 73 Fed. Rep. 774, 20 C. C. A. 3, the policy contained a provision practically identical with the provision in the policy in this case, above set out, and it was held that under a policy promising indemnity in case death results solely because of bodily injuries effected by external, violent, and accidental means, and independently of all other causes, the burden of proof is on those claiming under the policy to show that the accident was the sole cause of death independently of all other causes. In that case the disease, from which the insured suffered, pre-existed the accident, while

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in this the disease supervened between the injuries and the death of the insured, but the principle is the same in each. In either case the burden to be borne by the claimant of the indemnity was, that not only were the injuries sustained by the insured sufficient to cause death as a result, but that they did in fact produce death independently of any other concurring cause.

The second instruction given for defendant in error was as follows: "The court instructs the jury, that if they believe from the evidence that the insured, William Peltier, on the 12th day of June, 1903, through external, violent, and purely accidental causes, received personal bodily injuries, the reasonable and natural consequences of which resulted necessarily in the death of the said William Peltier, and that the said William Peltier died on the 16th day of August, 1903, that then they should find for the plaintiff, unless they should further believe from the evidence that the said William Peltier's death was not the proximate and direct result of said injuries, but was the result of some other cause or disease independent of said injuries."

Much that has been said with reference to the first instruction applies with equal force to the second. The testimony of the attending and of the consulting physician is, that William Peltier had a typical case of typhoid fever, and no witness testifies to the contrary. Instruction No. 2, just quoted, left the jury to infer that before any other cause than his injuries could be considered by them as a defense to the action, it must appear to have been independent of the injuries, thus leaving entirely out of view the provision in the policy that if disease or other cause supervening concurred with the injuries in producing death, the insurer was not liable for the indemnity. Counsel for defendant in error admit that the instruction is imperfect, but insist that the imperfection is cured by an instruction given for plaintiff in error. It is true that an incomplete statement of the law in one instruction may be cured by a complete state-

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ment of it in another (*W. Alex. & Mt. V. Elec. Ry. Co. v. Quayle*, 95 Va. 741, 30 S. E. 391), but it must appear that when the instructions are read together the jury could not have been misled by the incomplete instruction.

That is not this case. The instructions are inconsistent and contradictory of each other. Defendant in error's instruction, undertaking to state all the facts necessary to authorize a verdict against the insurer for the amount of the indemnity, leaves out of consideration an essential view of the case. It is impossible for the court to say whether or not the jury were controlled by this erroneous instruction. *Richmond Pass. & Power Co. v. Steger*, 101 Va. 321, 43 S. E. 612, and authorities there cited; *C. & O. Ry. Co. v. Whitlow*, *ante*, p. —, 51 S. E. 182.

As the cause is, for the reasons stated, to be remanded, we do not think it proper to review the evidence farther than we have found it necessary in considering the instructions to the jury complained of, or to express an opinion as to its weight.

The judgment of the Corporation Court of the city of Bristol must be reversed and annulled, the verdict of the jury set aside, and the cause remanded for a new trial to be had in accordance with this opinion.

Reversed.

Statement.

Wytheville.

LYLE, RECEIVER, v. SARVEY.

June 22, 1905.

1. **EQUITY—When Deposition May be Read—Delay in Taking.**—A party to a suit in chancery has no right to read depositions in his favor simply because they are filed before a final decree in the cause, or before an interlocutory decree adjudging the matter controverted by the depositions. Whether testimony delayed until the hearing will be heard must depend upon a sound judicial discretion to be exercised upon the facts of the case, the nature of the evidence, the reasons given for the delay, and a variety of other circumstances. If the reading of the depositions would involve the continuance of a cause ready for hearing, a recommitment of a commissioner's report, a re-opening of the case for the introduction of other testimony, and a prolongation of the controversy, when the party making the motion has had abundant opportunity to take his proof, and has, without good cause, failed to do so, the depositions should be excluded. This is especially true where the court is dealing with its own receiver.
2. **RECEIVERS—Obedience to Orders—Promptness.**—A receiver is the hand of the court, and it is his duty to yield prompt and unquestioned obedience to all its lawful decrees. The court cannot tolerate a practice which renders it as difficult to compel the disbursement of funds in the hands of its receiver as to enforce the collection of a controverted demand.
3. **EQUITY PRACTICE—Distribution of Funds—Form of Decree—Amounts—Dates.**—In disbursing funds to creditors the decree should specify the amount decreed to each creditor, and the date from which interest is to be computed.

Appeal from a decree of the Corporation Court of the city of Roanoke in a suit in chancery. Decree in favor of creditors against the receiver of the court. Receiver appeals.

Reversed in part.

Opinion.

The opinion states the case.

William A. Glasgow, Jr., Hart & Hart and John Dabney Smith, for the appellant.

Smith & King and H. T. Hall, for the appellees.

WHITTLE, J., delivered the opinion of the court.

The primary purpose of this suit was to wind up the affairs of the Charles Lyle Drug Company, a corporation engaged in the retail drug business in the city of Roanoke, to pay its indebtedness, and distribute the surplus assets among the stockholders.

The plaintiff, Mrs. A. E. Sarvey, and her two sons, Charles and Edward Lyle, constituted the principal stockholders. Charles Lyle was a druggist, and the president and general manager of the company, and Edward Lyle the attorney who brought the suit, representing both plaintiff and defendant. The creditors were neither made parties nor informed of the litigation.

In the petition and answer of the company to the bill, by Charles Lyle, its president, the assets were estimated at \$9,930 and the liabilities at \$2,000. It was also averred that the president and general manager had tendered his resignation, and the defendant united in the prayer of the bill for the immediate appointment of Edward Lyle as receiver. The answer was accompanied by the affidavit of Edward Lyle, that the corporation was solvent "and possessed of assets sufficient to pay all its creditors in full." Upon the same day the judge of the Hustings Court made an order appointing Edward Lyle receiver, and requiring him to execute bond with approved security in the penalty of \$6,000. He was directed to collect the assets of the company, and sell the stock and fixtures to the best advantage; to pay the expenses incident to the receivership; to rent the necessary buildings to preserve the property until sold; and also to report, from time to time, his proceedings as receiver.

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Within a short time after the date of this order a number of creditors of the company intervened, and at their instance the cause was referred to a commissioner to take an account of debts and assets, and report any other matter deemed pertinent.

On May 22, 1903, the commissioner returned his report, in which he says the receiver had neglected to furnish a statement of his transactions, although repeatedly requested and repeatedly promising to do so. At the request of the creditors, he made up his report in the absence of such statement, returning therewith a copy of a letter written by the receiver to counsel, under date of December 7, 1900, admitting that he had taken possession of the stock of goods of the company of the inventoried value of \$3,721.32, and open accounts due the company to the amount of \$2,500, of which he thought \$1,000 could be reasonably expected to be collected. The commissioner reported the debts proved, but did not report what assets had come into the hands of the receiver. Therefore, on February 14, 1903, the report was recommitted to another commissioner, who returned his report September 19, 1903, in which he charged the receiver with \$3,721.32, the inventoried value of the stock of goods, and \$1,000 in open accounts. He also reported that the White Front Pharmacy was really the property of the defendant company. With respect to the conduct of the receiver, the commissioner reports that he had used every means given him by the law to compel the production of books and papers of the Charles Lyle Drug Company and the White Front Pharmacy, without avail; that counsel for the receiver stated that he would close his account by July 25, but failed to do so, and the commissioner kept the account open until September 19, 1903, relying upon the continued promises of the receiver to produce the books, together with the statement of his accounts as receiver; when, finding that further indulgence would be fruitless, he returned his report.

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On December 30th following, the receiver, over the objection of creditors, gave his deposition in the cause, the object of which was to extenuate his conduct in failing to settle his accounts, and to reduce his liability as ascertained by the report of the commissioner.

At the final hearing of the cause, April 30, 1904, the court sustained the motion of creditors to suppress the deposition of the receiver, and, overruling his exceptions to the report (save only to so much thereof as ascertained the White Front Pharmacy to be the property of the defendant company), confirmed the report, and directed the receiver to pay the debts established thereby. From that decree this appeal was allowed.

The bare recital of the foregoing facts would seem to afford complete justification for the action of the court. In his belated deposition the receiver undertakes to excuse his flagrant neglect of duty to make reports, as required by law and the order appointing him, on the grounds that during his receivership his time was engrossed with public duties as State senator, and the continued absence from the State of his brother, Charles Lyle, who was engaged as a traveling salesman, and who, by reason of his position of president and general manager of the company, was familiar with its affairs.

When it is remembered that about three years had elapsed between the appointment of the receiver and the final settlement of his account by the commissioner, it is not surprising that the court declined to accept these frivolous excuses and refused to grant the receiver further indulgence.

The statute under which he claims the right to have his rejected deposition read is as follows:

"In a suit in equity, a deposition may be read, if returned before the hearing of the cause, or, though after an interlocutory decree, if it be as to a matter not thereby adjudged, and be returned before a final decree." Va. Code, 1904, sec. 3362.

In construing that statute this court observes: "But the right is not an absolute one. The statute does not say the deposition

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shall be, but it *may* be read. It could hardly have been intended that after a cause had been referred to a commissioner and ample opportunity offered both parties to introduce their witnesses, and after the commissioner had made his report and the cause was ready for a hearing, that one of them should have the absolute right at any time thereafter to bring forward his testimony, deliberately or negligently withheld without cause from the commissioner, and demand it shall be read upon a controverted matter of fact, passed upon by the commissioner and made the subject of the report. Such a construction would be but a premium for negligence, and would place in the power of one or the other of the parties, in many cases, to protract litigation almost indefinitely. Whether testimony thus delayed will be heard must in every case depend upon a sound judicial discretion to be exercised upon the facts of the case, the nature of the evidence, the reasons given for the delay, and a variety of circumstances which must be adjudged as they arise. The maxim that the laws assist those who are vigilant, not those who sleep over their rights, applies not only to the operation of statutes, but to the action of suitors in the conduct of their suits. In the case before us, the reading of the appellees' depositions would have involved a continuance of the cause when it was ready for a hearing, a recommittal of the commissioner's report, and a reopening of the case for the introduction of other testimony, and a prolongation of the controversy. The adoption of such a rule would not only be unjust in this particular case, but it would furnish an extremely bad precedent in other cases." *Richardson v. Duble*, 33 Gratt. 730, 740.

The pertinency of the language of the learned judge in the case above cited to the facts of this case warrants the extended quotation from his excellent opinion. Indeed, the views therein expressed apply with stronger reason to this case, where the court was dealing with its own receiver.

The evidence was ample to sustain the findings of the commissioner. The receiver had already in the pleadings, pre-

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pared by himself as counsel, in his affidavit to the answer, and in his letter to counsel for creditors, solemnly admitted that the assets were sufficient to discharge all liabilities of the company; and, after having persistently disobeyed the orders of the court, and neglected to avail himself of two opportunities of settling his account before its commissioners, when the cause was ready for final hearing, to have granted further delay would have been an abuse rather than a proper exercise of the court's discretion under the statute invoked, and would have tended to bring reproach upon the administration of justice. In dealing with receivers the court cannot tolerate a practice which would place them on the footing of ordinary debtors, and render it as difficult to compel the disbursement of funds in their hands as to enforce the collection of a controverted demand. A receiver is the hand of the court, and it is his duty to yield prompt and unquestioned obedience to all its lawful decrees.

It follows from these views that the rulings of the trial court complained of by appellant are without error, and the decree in that aspect of the case must be affirmed.

Under Rule IX., appellees assign as cross-error the action of the court in sustaining the exception of appellant to that part of the last report in the cause which ascertained that the White Front Pharmacy was the property of the Charles Lyle Drug Company.

The evidence upon which that finding was founded may be summarized as follows: The license was originally, and for several years thereafter, taken out in the name of the Charles Lyle Drug Company, and the store in which the business was conducted was leased to that company until December 1, 1900. Executions in the hands of the sergeant of Roanoke, prior to and at the time of the institution of this suit, against the Charles Lyle Drug Company, were levied indifferently upon the goods in both stores, and the receiver on May 2, 1902, told the sergeant that the branch store was the property of the defendant company. He furthermore informed that officer, to whose hands

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the estate of his mother, Mrs. A. E. Sarvey, deceased, was committed for administration, that although the business of the White Front Pharmacy, at one time, had been conducted in the name of his mother, she neither owned it nor knew that it was in her name. This statement was made after the death of Mrs. Sarvey when the sergeant applied to Edward Lyle for the assets to pay the debts of the White Front Pharmacy. Both stores were under the general management of Charles Lyle, and the employees understood that the branch store belonged to the Charles Lyle Drug Company. It also appears that when the White Front Pharmacy was sold by Charles Lyle the cash payment and notes were made to Edward Lyle. There was other evidence tending to establish the Charles Lyle Drug Company's ownership of the branch store; and, taken as a whole, the evidence was quite sufficient to sustain the report of the commissioner in that regard.

The decree in that respect is, therefore, erroneous and must be reversed, and the cause remanded for further proceedings to be had therein, not in conflict with this opinion; and in future decrees providing for the payment of demands against the company, the amount of each demand, with the date from which interest is to be computed, should be specifically set forth. *Spoor v. Tilson*, 97 Va. 279, 33 S. E. 609; *People's National Bank v. Virginia Textile Co.*, ante, p.—, 51 S. E. 155.

Reversed in part.

Statement.

Wytheville.

RICHARDSON v. WYMER.

June 22, 1905.

1. EJECTMENT—Plaintiff's Title—Case at Bar—Sale Under Void Execution.—

Land was sold under an execution in favor of the Commonwealth and bonds given by the purchaser for the purchase price and returned by the sheriff, but not paid. Subsequently another execution was issued on the same judgment, and levied on the same land, then in possession of the first purchaser. At this sale the first purchaser again became the purchaser and time was given him to execute the bond required by law, but he failed to do so, and the land was again offered for sale on the same day, when defendant in error became the purchaser and paid the purchase money, and the sheriff conveyed the land to him. The second purchaser then brought ejectment against the first purchaser, who offered to show the above stated facts with reference to the first sale, in order to show that the second execution was void. The trial court excluded the evidence.

Held:

1. The evidence in favor of the plaintiff is sufficient to entitle him to recover.
2. The second execution was valid, and there was no error in rejecting the offered evidence as it entirely fails to prove the satisfaction of the judgment.

Error to a judgment of the Circuit Court of Smyth county in an action of ejectment. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

G. H. Fudge and *H. N. Bell*, for the plaintiff in error.

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A. M. Dickenson, for the defendant in error.

KEITH, P., delivered the opinion of the court.

J. P. Wymer instituted an action of ejectment to recover twenty-three acres of land from W. R. Richardson. In support of his claim he offered in evidence a deed from B. F. Buchanan, commissioner in the chancery suit of *F. McMullin's Administrator v. J. H. Stephenson*, and V. S. Morgan, of the first part, and W. R. Richardson, Mary E. Richardson, and James E. Richardson, of the second part, conveying a tract of land supposed to contain ninety acres, more or less, to William R. Richardson; also a deed of partition in the chancery suit of *Dickinson v. Richardson*, in which the land was divided into three equal parcels and assigned and conveyed to the parties entitled, the parcel allotted to Mary E. Richardson having been conveyed to her under the name of Maim Springs; and a deed from J. V. Richardson, sheriff and commissioner, conveying the land in controversy in this suit to J. P. Wymer, the defendant in error.

With respect to the last mentioned deed, it appears that on the 20th of May, 1902, there was issued from the clerk's office of the County Court of Smyth county an execution in the name of the *Commonwealth of Virginia v. Maim Springs*, in the sum of \$100.00, fine, and \$23.82 costs, upon a judgment obtained against her on the 18th of August, 1890; that the execution was issued on the 20th of May, 1902; that it was levied on June 11, 1902, on the tract of land containing $23\frac{3}{4}$ acres, which had been assigned to Maim Springs, as aforesaid, in the case of *Dickinson v. Richardson*, and that at the sale under the execution J. P. Wymer became the purchaser at the price of \$187.00, which having been fully paid off and discharged, a deed was executed to him by the sheriff, conveying him the land purchased, with special warranty.

It appears from the testimony of the defendant in error that W. R. Richardson was at the time of the purchase in possession

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of the land; that he was the father of Maim Springs, to whom the land belonged, but who had not lived upon it for about twelve years; and that her father, the defendant, had during that time been in possession and control of it as her agent.

The defendant, to maintain the issue upon his part, offered to introduce an execution upon the same judgment, dated the 26th of June, 1891, the return on which shows that it was levied on the land of Maim Springs, now in controversy; that the land was sold under this execution on the 19th of October, 1891; and that the purchaser gave bond and surety according to law, and that the bond was returned to the clerk's office. The defendant also offered the deposition of John R. Cooley, who states that he was one of the sureties upon the bond given at the sale under the execution of 1891, but he wholly fails to prove that this bond, or any part of it, had ever been paid, nor does he know what became of it. He cannot recall the date or the amount with any degree of certainty, but he states that Maim Springs and her father, W. R. Richardson, were the principals, and he and one Stephen Richardson, who is now dead, were the sureties. It further appears that before Wymer purchased the land the sheriff offered it for sale, and that W. R. Richardson, the defendant, was the highest bidder, and that it was knocked off to him for \$240.00; that time was given him to execute the bond required by law; and that he failed to give it; and that the land was again offered for sale on the same day when Wymer became the purchaser.

Thereupon the jury found a verdict for the plaintiff, upon which the court entered judgment, and the defendant in the court below applied for and obtained a writ of error from one of the judges of this court.

The first assignment of error is that the evidence of the plaintiff is insufficient to entitle him to recover; but we are of opinion that it makes out a case quite sufficient to support the verdict of the jury.

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The principal reliance of plaintiff in error, however, is that the court erred in refusing to admit in evidence in his behalf the execution of June 26, 1891, with the endorsements thereon, and the deposition of John R. Cooley; his contention being that this proof is sufficient to show satisfaction of the judgment against Maim Springs, and that, having been satisfied, the execution which was issued on May 20, 1902, was null and void.

It is true that no execution can be issued upon a satisfied judgment, but the evidence offered entirely fails to prove the satisfaction of the judgment. It shows that an execution was issued and that a sale was made under it, but there are no facts in evidence which tend to prove that the purchase price of the land sold under the execution of 1891 was ever paid in whole or in part. Richardson, the plaintiff in error, was the purchaser at the sale under the first execution. He was the principal obligor in the bond given for the purchase price. He was present in court and was a competent witness, and it cannot be doubted that if the bond had been paid he would have testified to that effect; but so far from having done so, he became a bidder for the land under the second execution. It was knocked off to him, and, he failing to comply with the terms of the sale, it was again offered on the same day and purchased by the defendant in error. The levy of the execution upon which he relied and the sale under it did not constitute a satisfaction of the judgment upon which it issued unaccompanied by proof of the payment of the purchase price of the property sold, under the circumstances of this case.

The judgment of the Circuit Court is affirmed.

Affirmed.

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WESTERN UNION TELEGRAPH COMPANY v. HUGHES.

June 22, 1905.

1. TELEGRAPH COMPANIES—*Interstate Commerce—Domestic Messages—Police Power.*—The doctrine announced in *Western Union Tel. Co. v. Reynolds*, 100 Va. 459, that where the initial and terminal points of a telegram are both in this State, and it is transmitted over the wires of the same company, and concerns only citizens of this State, the message is a domestic one, and its character as such is not affected by the circumstance that the line passes in part over the territory of another State, or that the company has established a relay office in such other State, at which the message is lost, is reaffirmed. There is involved the exercise of an important police power of the State which ought not to be surrendered unless declared unconstitutional by the Supreme Court of the United States. *Keith, P.*, and *Cardwell, J.*, dissenting.

Error to a judgment of the Corporation Court of the city of Danville in an action of *debt*. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Addison L. Holladay and *James P. Harrison*, for the plaintiff in error.

Thomas Hamlin, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

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The facts in this case are essentially the same as in the case of *Western Union Telegraph Company v. Reynolds*, 100 Va. 459, 41 S. E. 856, 93 Am. St. 971, where the court sustained a judgment against the company for the statutory penalty, for failure to transmit and deliver a telegram, the initial and terminal points of which were both within the State of Virginia, notwithstanding the circumstance that the line passed in part over the territory of another State.

It is insisted, however, by counsel for plaintiff in error that this doctrine has been overruled by the decision of the Supreme Court of the United States in the more recent case of *Hanley v. Kansas City So. R. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333.

We cannot assent to that contention. In the last named case the court merely decided that the Railroad Commission of the State of Arkansas could not, without violating the commerce clause of the Federal Constitution, fix and enforce rates for the continuous transportation of freight between two points in the State of Arkansas, where a large part of the route is outside of the State through the Indian Territory, or Texas. The distinction between that case and the case at bar is obvious. In the latter there is no attempt to fix and enforce rates for the transmission of telegrams, but the court simply upheld the recovery of a penalty imposed by the statute upon a telegraph company doing business in the State for failure to transmit faithfully and impartially, and as promptly as practicable, a telegram, in accordance with its contract. This principle was distinctly recognized and sustained by the Supreme Court of the United States in construing a similar statute of the State of Georgia, in the case of *Western Union Telegraph Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, the authority of which is in no wise impaired by the case referred to.

It is true that this court, in the *Reynolds* case, cited and relied on *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192,

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12 Sup. Ct. 806, 36 L. Ed. 672, as analogous authority. But it will be observed that that case, like the case of *Hanley v. Kansas City So. R. Co.*, involved the power of a State to fix the rate of taxation upon the receipts of a railway company "for the mileage within the State, from transportation by continuous carriage from a point in the State, but over a line which, in its course between these points, passed out of the State into another State and back again into the State." It was that doctrine, and not the principle of the *James* case that has been modified by the recent decision of the Supreme Court of the United States.

The case in judgment, in our opinion, involves the exercise of an important police power of the State, a power which ought not to be surrendered, and which we are unwilling to surrender, in the absence of a direct and authoritative declaration on the part of the Supreme Court of the United States that it is violative of the Federal Constitution.

For these reasons the court will adhere to its former decision, and dismiss the case for want of jurisdiction.

CARDWELL, J., dissenting:

I am unable to concur in the opinion of the court in this case. The case, upon the agreed state of facts, is, as the opinion states, in all essential features the same as that of *W. U. Tel. Co. v. Reynolds*, 100 Va. 469, 41 S. E. 856, 93 Am. St. 971, decided June 19, 1902. In each case the action was to recover against the defendant the penalty of one hundred dollars, imposed by sections 1291 and 1292 of the Code of Va. for the failure to transmit and deliver dispatches in the manner and time set forth in those sections. In the former case the message was received by the telegraph company at Radford, Va., while in the present it was received at Danville, Va.; the first was addressed to the sendee at Tom's Creek, Va., and the second to a

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sendee at Pocahontas, Va., and both were lost at Bluefield, W. Va., where the telegraph company has a relay office, the only route by which the message in either case could be transmitted to its point of destination being *via* Bluefield, W. Va.

That it is settled law that a telegraph line is an instrument of commerce, and that telegraph companies, like railroad companies, are subject to the regulating power of Congress in respect to their foreign and interstate business, see *Postal Tel.-Cable Co. v. Umstadter*, 103 Va. 742, 50 S. E. 259, and authorities there cited.

This court having in *W. U. Tel. Co. v. Tyler*, 90 Va. 297, 18 S. E. 280, 44 Am. St. 910, and *W. U. Tel. Co. v. Bright*, 90 Va. 778, 20 S. E. 146, held that section 1292 of the Code, as applied to a case where the telegram in question was a domestic message, was not in conflict with the Constitution of the United States, or any act of Congress passed in pursuance thereof; and construing, as have the courts of other States, the decision of the Supreme Court of the United States in *Lehigh Valley R. Co. v. Penna.*, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672, as authority for the proposition that where both the point at which a telegram is received for transmission and the point to which it is addressed are in the same State, although the line over which the transmission is made passes into another State between the points, the penalty prescribed by the statute may be imposed for the default of the telegraph company occurring in the foreign State, as a reasonable exercise of the police power of the State and not an attempt to regulate commerce violative of the Federal Constitution, the telegram being regarded as a domestic message, dismissed the case of *W. U. Tel. Co. v. Reynolds*, *supra*, the amount involved not being large enough to give jurisdiction to the court.

The opinion by Whittle, J., after stating that the State of Pennsylvania levied a tax on the gross receipts of all railroad companies derived from the transportation by continuous carriage from points in Pennsylvania to other points in the same

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State, that is to say, passing out of Pennsylvania into another State and back again into Pennsylvania, in the course of transportation, and that the Lehigh Valley R. Co. had no road of its own from Mauch Chunk, Pa., to Philadelphia, but in transporting its coal, and general freight traffic, it used its own line from Mauch Chunk to Phillipsburg, N. J., from which point it was, under an arrangement for a continuous passage with the Pennsylvania R. Co., transported by the latter road *via* Trenton to Philadelphia, and that it was insisted that the State could not tax that part of the gross receipts derived from so much of the transportation as was wholly within the State of Pennsylvania, because the freight, during its entire transportation, was impressed with the character of interstate commerce, quotes from the opinion in *Lehigh Valley R. Co. v. Pennsylvania*, *supra*, as follows: "Commerce undoubtedly is traffic, but it is something more. It is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. . . . (*Gibbons v. Ogden*, 22 U. S., 9 Wheat. 189, 6 L. Ed. 23.) . . . The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same State, made interstate because in its accomplishment some portion of another State may be traversed? Is the transmission of freight or messages between two places in the same State made interstate business by the deviation of the railroad or telegraph onto the soil of another State? . . . It is simply whether in the carriage of freight and passengers between two points in the same State, the mere passage over the soil of another State renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk. . . . We

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will observe, however, that we think that the principle laid down by that (the trial) court is peculiarly adapted to cases like the present, in which there is such an exceptional facility for the evasion of State authority to fix the rate of charges. This may be done in an instant and without expense, by so adjusting the wires that messages must go through a part of the territory of another State."

In the more recent case, however, *Henley v. Kansas City So. R. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, the Supreme Court of the United States gave its own interpretation of the opinion in *Lehigh Valley R. Co. v. Pennsylvania*, *supra*, and held that the railroad commission of Arkansas could not, without violating the commerce clause of the Federal Constitution, fix and enforce rates for the continuous transportation of goods between two points within the State of Arkansas, where a large part of the route is outside of the State, through the Indian Territory, or Texas. The opinion, by Mr. Justice Holmes, says: "It is decided that navigation on the high seas between ports of the same State is subject to regulation by Congress (*Lord v. Goodall, N. & P. S. S. Co.*, 102 U. S. 541, 26 L. Ed. 224), and is not subject to regulation by the State (*Pac. Coast S. S. Co. v. R. R. Com'rs*, 9 Sawy. 253, 18 Fed. 10); and, although it is argued that these decisions are not conclusive, the reason given by Mr. Justice Field for his decision in the last cited case disposes equally of the case at bar. 'To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State.' 9 Sawy. 258, 18 Fed. 10." A number of other decisions are also cited as being in point.

The court having, in *Hanley v. Kansas City So. Ry. Co.*, *supra*, held that the transportation of goods on a through bill of lading from Fort Smith, Arkansas, to Grannis, Arkansas, over a line of railroad by way of Spiro, in the Indian Territory, a total distance of one hundred and sixteen miles, of which

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fifty-two miles is in Arkansas and sixty-four in the Indian Territory, is interstate commerce, subject to regulation by act of Congress only, the controlling question in the case at bar is, does the doctrine apply with equal force to a telegraphic dispatch to be transmitted from Danville, Va., to Pocahontas, Va., by way of Bluefield, W. Va., that being "the only possible and proper one from Danville, Va., to Pocahontas, Va., that is, by way of Bluefield, West Va.," and the default of the Telegraph Co. in transmitting and delivering the dispatch occurring wholly within the State of West Virginia.

As we have seen, it is settled law that a telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods, both companies being regarded as instruments of commerce, and their business commerce itself. While they do their transportation in different ways, and their liabilities are in some respects different, they are both regarded as indispensable to those engaged to any extent in commercial pursuits. *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067, and *W. U. Tel. Co. v. Pendleton*, 122 U. S. 356, 7 Sup. Ct. 1126, 30 L. Ed. 1187.

The opinion in *Hanley v. Kansas City So. Ry. Co.*, *supra*, approving the language employed by Mr. Justice Field I have quoted above and citing a number of cases regarded as in point, proceeds as follows: "There are some later State decisions contrary to those last cited. *Campbell v. Chicago, Milwaukee & St. Paul Ry. Co.*, 86 Ia. 587, 53 N. W. 351; *Seawell v. Kansas City, Fort Scott & Memphis Rd. Co.*, 119 Mo. 222, 24 S. W. 1102; *Railroad Commissioners v. Western Union Tel. Co.*, 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570. But these decisions were made simply out of deference to conclusions drawn from *Lehigh Valley Railroad Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672, and we are of opinion that they carry their conclusions too far. . . ."

One of the cases disapproved in *Hanley v. Kansas C., &c., Co.*, *supra*, is *Campbell v. Chicago, &c., Ry. Co.*, *supra*, holding that "an act of the Legislature, providing that regulations fixing max-

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imum rates of freight that may be charged by railroad companies for the transportation of property between points within the State of Iowa should be applicable whether such transportation shall be wholly within this State or partly within this State and an adjoining State or States, is not in conflict with sec. 8 of art. I., of the U. S. Constitution as being a regulation of commerce."

Another is *Railroad Com'rs v. W. U. Tel. Co.*, 113 N. C. 213, *supra*, (cited in *W. U. Tel. Co. v. Reynolds*, *supra*), where it was held that telegraph messages transmitted by a company from and to points in the State, although traversing another State in the route, do not constitute interstate commerce and are subject to the tariff regulations of the commission.

While the court, in *Hanley v. Kansas C., &c., Co.*, *supra*, referring to the case of *Lehigh Valley, &c., Co. v. Pennsylvania*, *supra*, says, "that was the case of a tax, and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders," thus recognizing the distinction indicated in *Pac. Coast S. S. Co. v. Rd. Com'rs*, *supra*, the only reasonable conclusion to be drawn from the opinion, as it appears to me, is, that the doctrine there announced has full and complete application to the transmission of a telegraphic dispatch from one point in a State to another point in the same State, traversing another State in its route, where the default in transmitting and delivering the dispatch occurred wholly within the foreign State.

Unlike the case of *W. U. Tel. Co. v. James*, 162 U. S. 650, *supra*, where the default of the telegraph company occurred wholly in the State of Georgia, and that of *Postal Tel.-Cable Co. v. Umstadter*, *supra*, where the default took place in this State, the meaning of the certificate of facts in the case at bar is that the message was delivered to plaintiff in error at Danville, Va., to be transmitted to Pocahontas, Va., and could not be transmitted from its point of origin to its point of destination without passing through the territorial limits of the State of

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West Virginia; that the message was transmitted by plaintiff in error from Danville, Va., to Richmond, Va., and from Richmond to Bluefield, W. Va., and that it was received at Bluefield where it was last heard from; it thus appearing that the default of plaintiff in error, for which the penalty prescribed by the statute is imposed in this case, occurred wholly within the State of West Virginia.

I am of opinion that upon this state of facts this court is bound by the decision of the Supreme Court of the United States in *Hanley v. Kansas City, &c. Co.*, *supra*, to hold that the statute, in so far as it authorizes the imposition of the penalty in such a case, transcends the police power of the State, and violates sec. 8, art. I., of the Constitution of the United States.

KEITH, P., concurs in the opinion of Cardwell, J.

Affirmed.

Syllabus.

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VIRGINIA IRON, COAL & COKE CO. v. TOMLINSON'S ADMINISTRATOR.

June 28, 1905.

1. EVIDENCE—*Experts—Common Knowledge—Harmless Error.*—Expert evidence touching matters of common knowledge is not admissible, but if admitted it is harmless error.
2. EVIDENCE—*Experts—Qualifications.*—The qualifications of a witness to testify as an expert being largely in the discretion of the trial court, the admission of such testimony will not be reviewed unless it clearly appears that the witness was not qualified.
3. EVIDENCE—*Experts—Opinions.*—If the evidence tends to prove the facts hypothetically stated in a question put to an expert, he may, in a proper case, give his opinion thereon.
4. MASTER AND SERVANT—*Dangerous Place—Warning—Other Dangerous Places.*—The negligence of a master in not warning an infant employee of dangers at his place of work cannot be established by evidence that other infants were permitted, with his knowledge and without objection on his part, to go in or near other dangerous places on the premises.
5. MASTER AND SERVANT—*Dangerous Place—Warning—Evidence of Lack of Warning.*—As it is not the duty of the master to warn his infant employees of dangers at any particular time and place, the fact that certain witnesses did not hear such warnings given, although they were in a position where they would have been likely to have heard them, if given, does not tend to prove with any degree of probability that no such warnings were given, and such evidence should not be received.
6. CONTRIBUTORY NEGLIGENCE—*Infants—Presumption.*—There is a *prima facie* presumption that an infant under fourteen years of age cannot be guilty of contributory negligence, and an instruction which ignores this presumption should be refused.
7. MASTER AND SERVANT—*Infant Servant—Negligence of Father.*—The fact that a father permits his infant son to accept employment in a dangerous business will not defeat his right of recovery against the master for the death of the son occasioned by the negligence of the master, or his servants.

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8. EVIDENCE—*Negligence—Particular Acts or Omissions.*—While the plaintiff must introduce evidence from which the jury may properly infer that an injury was caused by the defendant's negligence, he is not required to point out the particular act or omission which caused the injury.
9. INSTRUCTIONS—*Evidence to Support.*—Where there is direct evidence tending to show defendant's negligence, and circumstantial evidence tending to show that such negligence was the proximate cause of the injury complained of, it is not error to instruct the jury to find for the plaintiff if they believe as facts what such evidence tends to prove.
10. MASTER AND SERVANT—*Duty of Master—Ordinary Care—Infant Servant.*—Ordinary care, under all the facts and circumstances of the case, is the measure of a master's duty to his servants in the case of infants as well as in case of adults, though what is ordinary care will vary under different circumstances, one of which is the infancy of the servant.

Error to a judgment of the Circuit Court of Wythe county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

The instructions 2, 4, 10 and 13 given on behalf of the defendant after being modified as pointed out in the opinion of the court were as follows:

2.

"The court instructs the jury that to entitle the plaintiff to recover he must prove his case as it is alleged in his declaration, that he cannot allege one state of facts and recover upon other and different facts than those charged. As to what facts are proven the jury are the judges."

4.

"The court instructs the jury that where an employee is confronted with two methods of performing his work, the one safe and the other dangerous, where the employee has sufficient intelligence and capacity to distinguish between the safe and unsafe method he owes a positive duty to pursue the safe method

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irrespective of the degree of danger which may be involved in the unsafe method, and any departure from the path of safety will prevent his recovery in event he is injured. And if the jury shall believe from the evidence in this case that Vivian P. Tomlinson was ordered to start the washer and was not instructed how to start it and he was at the time of his injury in the act of starting it, and that he had sufficient intelligence and capacity to understand that it was safer to start the washer by pulling the belt from underneath than to stand upon the top of the belt, and if they shall believe that he was standing thereon, and that he could have performed the work in perfect safety by pulling the belt from underneath, and that he, knowing this was the safe method, adopted the more dangerous method contended for by the plaintiff, then the said Vivian P. Tomlinson was guilty of such contributory negligence as will defeat his recovery in this action."

10.

"If the jury believe from the evidence that the place at which Vivian P. Tomlinson was assigned to work at the chute was a safe place, and that his work and duties did not require him to come in close proximity to the cog wheels on which he was injured, and that the defendant had no reason to expect that the said Vivian P. Tomlinson by reason of his age, would leave his place and go so close to the cog wheels as to be caught therein, then no duty rested upon the defendant company to warn the said Vivian P. Tomlinson of the danger of becoming caught in the cog wheels."

13.

"If the jury shall believe from the evidence that Vivian P. Tomlinson whilst in the employment of defendant company had sufficient capacity and intelligence to know that cog wheels were dangerous and that if he came into contact with them he was likely to be caught and injured, and had sufficient capacity and intelligence to appreciate and understand that if he approached near said cog wheels he was liable to get caught and

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that the cogs in which he was caught were open and obvious, then no duty devolved upon defendant company to instruct him of the danger of said cog wheels and his liability to be caught and injured by them if he approached too near."

Fulton & Fulton and P. H. C. Cabell, for the plaintiff in error.

A. A. Campbell and Robert Sayers, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

Vivian P. Tomlinson, an infant aged eleven years and six months, lost his life whilst in the service of the Virginia Iron, Coal & Coke Company, and this action was instituted by his personal representative (his father) to recover damages on the ground that his decedent's death was caused by the negligence of the defendant company.

Upon a trial of the cause there was a verdict and judgment against the defendant company, and to that judgment this writ of error was awarded.

It appears that the defendant company was the owner and operator of machinery called a "buddle," used for the purpose of separating iron ore from the dirt and other impurities found with it. The buddle is located on the side of a hill, and is a structure in which there are three stories, or levels. The ore is brought on small cars from the mine to the upper story, or level, of the buddle, where it is dumped into washers. The washers consist of logs with paddles attached, encased in closed boxes into which water flows. The logs are made to revolve by means of a gearing consisting of pinions, cog-wheels, and belts driven by a steam engine. The paddles upon the revolving logs keep the ore pushed toward one end of the washer, and the mud and water pass out at the other end.

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The washers are covered over, and their covering make, or aid in making, the second level of the buddle. From the washers the ore passes into a screen through which water also passes, and from the screen the ore is carried through a chute into cars underneath the first or ground level. Steps lead from one level of the buddle to another.

The plaintiff's intestate was employed, with the consent of his father, to work at the chute on the bottom floor or level, his duty being to pick mud balls and other substances from the iron ore as it passed through the chute. Near the decedent's place of work was the gearing of the sand washer, with its cog-wheels, pinions, pulleys and belt, but not sufficiently close to endanger his safety whilst engaged in the work he was employed to do. He had been at work at this place for about six weeks prior to his death, which occurred on the 10th day of December, 1903, a few days before the wise and humane statute went into effect which makes it a misdemeanor to employ children under twelve years of age in such work. Va. Code, 1904, sec. 3657bb.

On that day, a few minutes before the buddle was stopped for the employees to get their dinner, he was found crushed to death between the cog-wheels (one of which is thirty-four inches in diameter) of the sand washer. There is no direct evidence as to the manner in which he came in contact with the cog-wheels and lost his life.

One of the theories of the plaintiff as to the manner in which the accident occurred, and the one principally insisted upon, is that the belt on the sand washer was slipping, as it sometimes did, and that the decedent, who had been directed by the foreman of the buddle to start the belt when it stopped, was attempting to start it by catching hold of the sill to which the roof was fastened, swinging over and tramping upon the belt with his feet, and that while engaged in this effort to start the belt he fell or was thrown between the cogs below and very near where he was killed, and that such mode of starting the belt was not only dangerous but beyond the scope of the decedent's duty, and that the decedent was not warned of the danger.

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To show that such a method of starting the belt was dangerous, several witnesses were permitted to give opinion evidence to that effect over the defendant company's objection. This action of the court is assigned as error.

The facts disclosed by the record show that such a mode of starting the belt, especially by a child eleven and a half years of age, was manifestly dangerous; at least the facts were of such character that jurors and men of ordinary intelligence generally would be just as competent to form an opinion and determine whether or not that mode of starting the belt was dangerous, as the witnesses. This being so, opinion or expert evidence was not admissible. Such evidence, as a rule, is not admissible where the facts already before the jury or which may be sufficiently brought before it, furnish all the materials necessary for its judgment. *Southern Ry. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285; 1 Wigmore on Ev., sec. 557. But while the evidence under consideration was not admissible, it was harmless error. *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857.

The trial court, over the defendant company's objection, permitted the plaintiff to testify, that when the buddle is overloaded and the belt is properly laced, the belt will not stop, but the overloading will either break the belt or some other part of the machinery. One objection made to this evidence was that it was not shown that the witness was an expert.

The qualification of a witness to testify as an expert being largely in the discretion of the trial court, its admission of such testimony will not be reviewed, unless it clearly appears (as it does not in this case) that the witness was not qualified. *Lane Bros. v. Bauserman*, *supra*; *Richmond Locomotive Wks. v. Ford*, 94 Va. 627, 27 S. E. 509.

The other objection was that even if the witness were an expert the questions asked called for his opinion upon a hypothetical condition of facts which were not proved in the case.

There was evidence tending to prove the facts hypothetically stated, and the questions were not, therefore, objectionable on that ground.

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The court permitted the plaintiff to prove that boys working about the puddle rode back and forth on the cars upon which the ore was hauled from the mine, with the knowledge of, and without objection by, the defendant company. This evidence was objected to by the defendant company, because even if riding on the cars was dangerous, and it were negligent in permitting it, there was no such charge of negligence in the declaration, and the evidence did not in the remotest degree have any connection with the decedent's death. The object of this evidence was to show that the defendant company had failed to instruct such children as to the dangers attending their employment, and general permission and custom for them to go into dangerous places about its works.

Evidence that children were permitted by the defendant company to go, or that they went with its knowledge and without objection, into or about the place where the deceased lost his life, was in our opinion admissible; but evidence that it had permitted other children to ride upon its cars which brought ore from the mine, or to go in or near other dangerous places upon the top of the buddle, in order to establish the negligence charged in the declaration was not admissible. Wharton on Ev., sec. 40.

Employees of the defendant company were permitted to testify that they had never heard the foreman, Vaughan, or any other boss of the defendant company, give any instruction to boys working where decedent worked as to the dangers of the machinery where he was killed, and that they were in a position where they would have been likely to have heard any such instruction, if given. This action of the court is assigned as error.

While it was the duty of the defendant company to instruct the decedent and the boys working with him as to the dangers of the machinery by which they were surrounded, yet such instructions were not required to be given at any particular time and place. That being the case, the fact that the witnesses whose

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evidence is under consideration did not hear such instructions given does not tend to prove with any degree of probability that no such instructions were given. The evidence was therefore inadmissible.

The defendant company asked for twenty instructions. Of these the court gave fourteen as offered, modified instructions numbered 2, 4, 10 and 13 and gave them as amended, and refused to give instructions Nos. 15 and 20. The action of the court in modifying and refusing the instructions mentioned is assigned as error.

We do not think that the court erred in making the additions it did to instructions numbered 2, 4, 10 and 13; nor did it err to the prejudice of the defendant company in giving them as amended.

Instruction No. 15 told the jury that if they believed from the evidence that the plaintiff's intestate, without any requirement from the defendant company, left the place at which he was assigned to work, and went in such close proximity to the cog-wheels, either for the purpose of getting grease from the post or cogs, or for any other purpose unconnected with the performance of his duty, then the defendant company was not responsible for the decedent's act in voluntarily exposing himself to such danger, and the jury should find for the defendant.

This instruction states a correct proposition of law as applied to an adult, but without qualification is an erroneous statement of the law as applied to an infant under fourteen years of age, as to whom there is a *prima facie* presumption that he can not be guilty of contributory negligence. *Lynchburg, &c. Mills v. Stanley*, 102 Va. 590, 46 S. E. 908. See 1 Shear. & Red. on Neg., sec. 73a; 1 Labatt on Neg., sec. 348. The court, therefore, properly refused to give that instruction.

Instruction No. 20 told the jury that if they believed from the evidence that the plaintiff contributed to the death of his son he could not recover. There is no evidence tending to prove that the father in any wise proximately contributed to the death of

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his son. It is true that he consented that his son might enter the employment of the defendant company, but if that company by its negligence caused the son's death, it clearly cannot defeat the father's right to recover therefor by showing that he consented to the employment. The court was plainly right in refusing to give that instruction.

The court gave six instructions for the plaintiff. The giving of each of these instructions, except No. 5 is assigned as error.

The first instruction is as follows: "The court instructs the jury that it is not necessary for the plaintiff to prove the exact way in which Vivian P. Tomlinson met his death, if they believe that he was killed; but if they believe that the plaintiff has shown by evidence, either direct or by facts and circumstances, that Vivian P. Tomlinson was killed, and that his death was caused by the negligence of the Virginia Iron, Coal & Coke Company, as set forth in any of the several counts of the declaration, though they are not certain in which way he was killed, they must find for the plaintiff."

The objections made to that instruction are that it is contrary to the well established principle that the plaintiff must establish the fact that the proximate cause of the decedent's death was the negligence of the defendant, and this he must do by affirmative evidence; and that the evidence did not warrant its being given.

There is direct evidence tending to show that the defendant company was guilty of negligence in failing to properly warn the decedent of the dangers which surrounded him, and in requiring him to perform dangerous work not within the scope of his employment, and while there is no direct evidence as to the manner in which he came to his death, there is evidence tending to show that it probably resulted from one or the other acts of negligence of which the evidence tended to show the defendant company was guilty. While the plaintiff must introduce evidence from which the jury may properly infer that the accident

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was caused by the defendant's negligence, he is not required to point out the particular act or omission which caused the accident. 2 Labatt on Neg., secs. 835, 836; 1 Shear. & Rcd. on Neg., sec. 58.

Instruction No. 2 given for the plaintiff is as follows: "The court instructs the jury that if they believe from the evidence that Vivian P. Tomlinson was an infant under fourteen years of age, and that he was employed by the Virginia Iron, Coal & Coke Company, and was required or permitted to start the machinery by pulling or tramping the belt, and was not instructed as to his danger as set out in instruction No. —; and if they further believe that this was outside the regular duty for which he was employed, and not within the compass of his age and experience, and was an hazardous employment, involving greater danger than the work for which he was originally employed, for an infant of his age and capacity, and that he was caught by the machinery as charged, and killed in so doing, then they are instructed that said infant did not assume the risk of the same, and they must find for the plaintiff."

The objection made to this instruction is that there was no allegation in the declaration that the decedent was put to work outside of the scope of his employment, and that there was no evidence upon which to base it.

There is evidence tending to prove that the decedent was directed to start the belt when it slipped, and that one of the ways of starting it was more dangerous than the work he was employed to do. The second count of the declaration, after setting out the dangerous character of the place where the decedent was employed to work, alleges among other things that the defendant company negligently and wrongfully employed the decedent in a dangerous place, and in a dangerous occupation for an infant under fourteen years of age, in this, that it required him to start said machinery when it stopped by starting a belt connected with the machinery, and in discharging that duty the decedent necessarily came into close and dangerous proximity

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to the revolving cog-wheels which caused his death. Under the allegations of that count, we think the plaintiff had the right to show that such work was beyond the scope of the decedent's employment in order to prove the negligence charged, and to have the jury instructed upon that subject.

The plaintiff's instruction No 3, which is upon the question of contributory negligence is objected to because the evidence fails to show that the proximate cause of the decedent's death was the negligence of the defendant company.

There was, as before stated, direct evidence tending to show that the defendant company was guilty of negligence, and the circumstantial evidence tended to show that such negligence was the proximate cause of the decedent's death.

The same evidence justified the court in giving instruction No. 4 over the defendant's objection that there was no evidence upon which to base it.

The objection made to the sixth instruction is that it imposed a higher degree of care upon the defendant company for the protection of the decedent than is imposed by law. That instruction told the jury that the law required of the master the highest degree of responsibility for the care and protection of an infant employee.

The settled law of this State, by a long line of decisions, is that it is the duty of the master to exercise ordinary care for the safety of his servant in the course of his employment, but he is not bound to use any higher degree of care. See *Parlett v. Dunn*, 102 Va. 459, 46 S. E. 467, and the numerous cases cited.

What is ordinary care depends upon the facts and circumstances of the particular case. What would be ordinary care in one case might be gross negligence in another. The degree of care due by the master to an infant employee of tender years is much greater than is due to an adult. *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 594, 46 S. E. 908. But whatever be that degree of care, it is ordinary care under all the facts and circumstances of the case. There is language in the opinion

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of the court in the case last cited, which, standing alone and not considered in connection with other parts of the opinion and the authorities cited, might warrant the language used in the instruction under consideration. But that case was not intended to change the rule that ordinary care under all the facts and circumstances of the case was the measure of the master's duty to his servant in the case of infants as well as in the case of adults. This is apparent from the authorities quoted and relied on in that case for the conclusion reached.

Shear. & Red. on Neg., sec. 219, is quoted with approval in that case (page 594), in which the law is laid down as follows: "It is the duty of one who employs young persons in his service to take notice of their apparent age and ability, and to use ordinary care to protect them from the risks which they cannot properly appreciate and to which they ought not to be exposed."

Thompson on Neg., which is also cited and quoted in that case, in sec. 3767 of his work, in discussing this question, says: "but in all these and in other risks the limit of his (the master's) duty and obligation is the exercise of *reasonable or ordinary care*."

And Bailey on Personal Injuries, who is also cited and quoted in the *Stanley Case*, declares that the measure of the master's liability to his servant is reasonable or ordinary care. Vol. 1, sections 963 to 966.

The instruction did not state the law correctly as to the measure of the master's duty to the servant, and the court erred in giving it.

It will be unnecessary to consider the remaining assignment of error, viz.: As to the refusal of the court to set aside the verdict of the jury and grant a new trial, since the judgment will have to be reversed, the verdict set aside, and a new trial granted for the errors heretofore pointed out.

Reversed.

Statement.

Wytheville.

THE BIG STONE GAP IRON COMPANY v. OLINGER.

June 28, 1905.

1. **EVIDENCE—Burden of Proof—Mining Lease—Conditional Contract.**—If a contract to mine so much ore per month and pay an agreed royalty per ton, provided there is that much merchantable ore upon the land capable of being mined at a reasonable cost, be abandoned by the lessee, the burden of proof is on him to show that the land did not contain ore of the requisite quantity and quality.
2. **INSTRUCTIONS—Evidence to Support—Case at Bar.**—It is error to give an instruction when there is no evidence tending to support it. In the case at bar there was no evidence tending to show that the lessee rescinded the contract of lease under the privilege reserved in the contract to do so upon paying a stipulated sum. On the contrary, the evidence shows that the contract was abandoned in pursuance of another clause of the contract.
3. **MINING LEASE—Cost of Mining—Reasonable Cost—Comparison With Other Mines.**—In order to determine whether ore can be mined at a reasonable cost, it is not sufficient to show the cost at other mines in operation. To make such a comparison proper, the conditions at the several mines compared should be the same.
4. **EVIDENCE—Merchantable Commodity—How Ascertained.**—Whether or not a commodity, such as iron ore, is merchantable is not to be determined solely from the expert evidence introduced on that subject, but from all the evidence which the court has admitted on that subject.

Error to a judgment of the Circuit Court of Lee county in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

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The instruction referred to in the court's opinion as contained in bill of exception No. 6, with the addition by the court, is as follows:

"The court further tells the jury that while the burden of proof is on the defendant to prove that the land of the plaintiff leased by it did not carry the requisite amount of iron ore that was merchantable and capable of being mined at a reasonable cost yet in sustaining this burden, it is not necessary for the defendant to show that it made any extraordinary or unusual tests to ascertain the fact, and if the jury believe from the evidence that the defendant made or caused to be made, the tests ordinarily used by men skilled in such matters, to determine such a question, and did not find said ore in sufficient quantity, and further believe from a preponderance of all the evidence in the case that said land does not carry said ore in sufficient quantity, then they will find for the defendant."

"Unless they further believe from the evidence that the defendant cancelled the contract in the manner referred to in plaintiff's first instruction."

Irvine & Slemph and Ayres & Fulton, for the plaintiff in error.

Bullitt & Kelly, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

On the 23rd of August, 1899, John C. Olinger, the defendant in error, entered into a mining lease with R. A. Ayres. On the 20th of October, 1899, Ayres transferred said lease to the plaintiff in error. The lessor had notice of this transfer and agreed in writing to accept the plaintiff in error as lessee under the contract in the place of Ayres. This action was brought by the defendant in error to recover from the plaintiff in error certain royalties claimed to be due him under this mining lease, and a judgment was obtained against the plaintiff in error for \$1,501.50, and thereupon a writ of error was awarded by this court.

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The lease contract which was the basis of the suit, gave to the plaintiff in error the exclusive privilege of mining iron ore upon certain land of the defendant in error for a term of five years from the date of the lease.

The terms of the lease, so far as necessary to be stated, were as follows: That the lessee should pay to the lessor a royalty of ten cents per ton for every ton of 2,240 pounds taken from the land, payable on the 20th day of the month following the month during which the ore was taken out; that the lessee was to mine not less than 1,000 tons of ore per month from the date of the lease, provided there was and continued to be that much merchantable ore on the land capable of being mined at a reasonable cost; that the lessee was to pay the royalty on the minimum amount each month, whether he mined the same or not, provided that if he failed to mine such minimum during any one month he might mine the deficit during the next month or at any time during the lease without again paying therefor; and that the lessee might at any time rescind and cancel the lease by paying to the lessor the amount of one year's royalty.

It is manifest that both parties were in doubt as to whether the development of this property would disclose iron ore in sufficient quantity and quality to justify a continuation of the contemplated enterprise.

Three propositions are made very clear by the contract:

(1) That it was the duty of the lessee to proceed with his mining operations as promptly as possible, for he had to pay the minimum royalty from the date of the lease, whether he prosecuted his mining operations or not; (2) That the lessee was only bound to mine the minimum of 1,000 tons per month, provided there was and continued to be that much merchantable ore on the land capable of being mined at a reasonable cost; and (3) that although iron ore might exist upon the leased premises of such quantity and quality that it could be mined at a reasonable cost, still the lessee would have the right to cancel the lease at any time by paying for such privilege the

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minimum royalty for one year from the day the contract was rescinded. These provisions are not only clear from the language of the contract, but they seem to be reasonable, for a lessee could hardly be expected to continue the expenditure of large sums in a vain pursuit for iron ore; nor would it be desirable for him to continue running operations if the ore had no market, or for any other reason could not be made profitable.

It is not pretended that the plaintiff in error failed to proceed with mining operations upon the leased premises, and therefore the case here does not arise under the first proposition, where the plaintiff in error would be required to pay the minimum royalty whether mining operations were conducted or not. Nor does the case before us arise under the third proposition, where the lessee had availed himself of the privilege of rescinding the contract, for there is no evidence to support such a view.

On the 25th of March, 1900, the general manager of the defendant company had served upon the lessor the following notice:

"Mr. J. C. OLINGER,

"DEAR SIR:

"I have been instructed by Mr. Pettit to inform you that all work on your property will be abandoned by the 1st of April, 1900.

"Yours truly,

"R. F. BODY, Supt."

The evidence shows that from the date of the contract of lease to the date of this notice, about seven months, the plaintiff in error was engaged in prospecting upon the leased premises, opening mines and mining ore, and that three or four thousand dollars was expended upon such work. In pursuance of the above mentioned notice the enterprise was abandoned upon the ground, as claimed, that merchantable ore could not be found

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on the land capable of being mined at a reasonable cost. On the other hand, the defendant in error contended that the ore was there, and that sufficient development to disclose that fact had not been made.

All of the evidence in the case was directed to this inquiry. So that the sole question of fact to be submitted to the jury was: Did the plaintiff in error make a *bona fide* effort to discover and mine the ore, or did it act in bad faith and abandon the enterprise without having made proper and sufficient effort to discover and mine the ore?

The first question to be considered is raised by the third instruction given for the defendant in error, which places upon the plaintiff in error the burden of showing that there was not on the land merchantable iron ore capable of being mined at a reasonable cost. There was no error in this instruction.

The lessor could not show that the land did contain ore of the requisite quantity and quality without the expenditure of a large sum of money. The record of this case shows that it is a costly matter to determine whether land contains iron ore of the quantity and quality here contemplated. It is very clear that one of the chief inducements influencing the lessor to make the contract under consideration was to have the ore developed, if it existed. This duty the lessee contracted to perform. It, therefore, is the proper party to find and ascertain the quantity and quality of the ore. Under such circumstances the plaintiff in error must assume the burden of showing that there was not on the land merchantable iron ore capable of being mined at a reasonable cost. *Jouett v. Spencer*, 1 Exch. 647; *Muhlenberg v. Henning, &c.*, (Pa.), 9 Atl. Rep. 144.

This view also disposes of instruction No. 4 asked for by the defendant company, and shows that it was properly rejected.

Objection is made to the action of the court in giving for the plaintiff below the following instructions:

No. 1.

"The court instructs the jury that if they believe from the
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evidence that the defendant intended to and did rescind and cancel the contract sued on under and pursuant to clause "e" of said contract, they will find for the plaintiff the sum of twelve hundred dollars, with interest from April 1, 1900; and they will also find for the plaintiff, if they believe from the evidence that the defendant intended to and did cancel the said contract as aforesaid, the additional sum of one hundred dollars, with interest from April 20, 1900, unless they further believe from the evidence that there was not in the month of March, 1900, on the land in controversy as much as one thousand tons of merchantable iron ore, capable of being mined at a reasonable cost."

No. 2.

"On the other hand, if they believe from the evidence that the defendant did not cancel the contract sued on under and pursuant to clause "e" thereof, then they will find for the plaintiff the sum of one hundred dollars per month from and including March, 1900, to and including May, 1901, with interest on each one hundred dollars from the 20th of the month following the month it became due, or in other words they will find for the plaintiff thirteen hundred dollars principal and \$201.50 interest, unless they believe from the evidence that there was not on the land in controversy as much as 13,000 tons of merchantable iron ore capable of being mined at a reasonable cost."

It was error to give these instructions. They are misleading and confusing. They invite the jury to consider and determine whether or not the defendant company rescinded and cancelled the lease under and pursuant to clause "e" of the contract, when there is no evidence in the record tending to show that the defendant rescinded the contract in pursuance of its privilege to do so under clause "e." On the contrary, the whole evidence shows that the contract was abandoned because, as claimed, the ore was not there in sufficient quantity and quality to be mined at a reasonable cost. As already stated,

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the sole question of fact to be submitted to the jury was, did the plaintiff in error make a *bona fide* effort to discover and mine the ore. If such reasonable and proper effort was made, then the jury should find for the defendant. On the other hand, if the jury believed from the evidence that the defendant company acted in bad faith, and abandoned the enterprise without having made proper and sufficient effort to find and mine the ore, they should find for the plaintiff the minimum royalties due him under the contract.

For the same reason it was also error to add to the instruction asked for by the defendant company, which is set forth in bill of exceptions No. 6, the words, "unless they further believe from the evidence that the defendant cancelled the contract in the manner referred to in plaintiff's first instruction." The instruction, as asked for, was proper, and should have been given without addition thereto.

Instruction No. 5, asked for by the defendant company, tells the jury that if they find from the evidence that the cost of mining ore on the Olinger land exceeds the cost at other mines in operation, they may find from this fact that such cost was not a reasonable cost.

This instruction was properly refused. It leaves out of consideration the difference that might exist in the known conditions at the other mines, as to which the comparison was to be instituted. For such a comparison to be proper in determining what was a reasonable cost, the conditions at the several mines compared should be the same.

Instruction No. 6, asked for by the defendant company, tells the jury that the question of whether or not a commodity is merchantable is to be determined by expert witnesses, and that if they believe the defendant has shown by a preponderance of the evidence of such expert witnesses that the ore in question was not merchantable they must find for the defendant.

There was no error in rejecting this instruction. It limited the jury to the consideration of the testimony of expert wit-

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nesses on the subject of inquiry, whereas the jury were entitled to consider all the evidence which the court had admitted bearing on that subject. This subject was sufficiently covered by instruction No. 4 for the plaintiff, which was properly given.

For these reasons the judgment must be reversed, the verdict set aside, and the case remanded for a new trial, to be had in accordance with the views expressed in this opinion.

Reversed.

Syllabus.

Wytheville.**WATTS v. WATTS' EXECUTRIX AND OTHERS.**

June 28, 1905.

1. **EQUITY—Parties—Agents or Servants.**—Where a mother controls and manages a farm, and takes all the rents and profits arising therefrom, her sons who simply assist her in running the farm are not proper parties to a suit against the mother to have an account of such rents and profits.
2. **GUARDIAN DE FACTO—Tenant in Common—How Chargeable.**—A father who, as tenant in common with his infant son, takes all the rents arising from that portion of the land belonging to the son, occupies the relation of *de facto* guardian to his son, and must account for such rents with compound interest thereon; and if the father conveys the property to his wife and she takes possession of the whole land and receives the entire proceeds thereof, she becomes in like manner a guardian *de facto* of the infant from the date she receives the deed and takes possession, and is chargeable in like manner. It is immaterial that the father and his wife were successively tenants in common with the son. They are nevertheless chargeable as guardians *de facto*.
3. **TENANTS IN COMMON—Interest—Guardian de facto—Code, Sec. 3294.**—At common law a tenant in common could not have an accounting from the occupying tenant, in the absence of an express contract, even though excluded from the common property. This was changed at an early day by what is now Sec. 3294 of the Code, but this section was not meant to deprive an infant tenant in common from recovering compound interest from a guardian *de facto* who was his co-tenant.
4. **GUARDIAN DE FACTO—Tenants in Common—Rents—Ascertainment of Infant's Share.**—In ascertaining the amount of rents with which the *de facto* guardian is chargeable by reason of having used and enjoyed the infant's land which the guardian held in common with his own land, if the metes and bounds of the infant's land are known and ascertained, the rents of that boundary should be fixed and charged to the guardian, and not charge him merely with the infant's proportion of the rent of the tract as a whole.

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5. *PAYMENTS—Gifts—Presumption.*—If a father is indebted to his son and places money to the credit of the latter in bank, the presumption is that this was intended as a payment on account, and to overcome this presumption the evidence must be clear and convincing.
6. *PARENT AND CHILD—Support—Application of Infant's Estate.*—It is the common law duty of a father to support his child, if of ability to do so. Where the child has property of its own, the court, in the application of this rule, looks at the circumstances of the particular case, and determines according to the right and justice thereof, having in view the position and wealth of the parties.
7. *PARENT AND CHILD—Step-children—Support.*—A step-mother who is chargeable as guardian *de facto* of her infant step-son, whose father is insolvent, should be allowed credit for the support and maintenance of said step-son and the keep of his horse, where the support of the family has devolved upon her.
8. *TENANTS IN COMMON—De facto Guardians—Improvements—Repairs.*—No credit for improvements or repairs should be allowed to a *de facto* guardian of an infant who is tenant in common of the infant.

Appeal from a decree of the Circuit Court of Tazewell county in a suit in chancery. Decree for defendants. Complainant appeals.

Reversed.

The opinion states the case.

Henry & Graham and Chapman & Gillespie, for the appellant.

W. H. Werth, for the appellees.

HARRISON, J., delivered the opinion of the court.

For some time prior to the year 1890, John G. Watts and Hattie B. Watts, his wife, owned and lived upon a very valuable farm, containing, as shown by recent survey, 494 acres, situated about three miles east of Tazewell Courthouse.

In 1890 Mrs. Watts departed this life, leaving surviving her two infant sons, one of whom died soon after his mother leav-

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ing surviving him his brother, R. Bowen Watts, the complainant in this cause. In 1892 John G. Watts was married again to a widow with four sons, all of whom came to live with him upon the farm mentioned.

On the 28th day of March, 1895, John G. Watts conveyed all of his interest in the farm to his second wife, Mrs. F. G. S. Watts, except 101 acres, known as the "Dill's Meadow tract," conveyed by him on the same day to A. P. Gillespie, trustee, for the benefit of his creditors. From the death of the first wife to the date of the deed conveying his interest in the farm to the second wife, the entire property was in the exclusive possession and control of John G. Watts, he enjoying and appropriating to himself the entire rents and profits. From the time that the second wife acquired the interest of her husband in the farm, she used and managed the whole tract, and received the entire rents and profits.

This suit was instituted by R. Bowen Watts, suing by his next friend and guardian, for a partition of the land, and to recover his share of the rents and profits, due him since the death of his mother to whose interest in the farm he had fallen heir.

By decree of August 31, 1901, the court settled the respective rights of the parties in the land and appoined commissioners to partition the farm in accordance with the directions of the decree. The commissioners made a report, from which it appears that they laid off by metes and bonds to the complainant 284 acres of land with the residence and other buildings thereon, as that portion of the farm to which he was entitled as the heir of his mother; that they laid off by metes and bounds the "Dill's Meadow tract," containing 101 acres, to the estate of John G. Watts, who had died before the partition was completed, subject to the deed of trust in favor of A. P. Gillespie for the benefit of creditors; and that they laid off to Mrs. F. G. S. Watts, by metes and bounds, 109 acres—that being the residue of the interest of John G. Watts which had been conveyed to her by him.

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To this report no exception was taken by any party, and it was confirmed by decree of December, 1901, and the several parties put into immediate possession of their respective interests; R. Bowen Watts having attained his majority on the 13th day of the preceding March.

The cause having been revived in the name of Mrs. F. G. S. Watts, executrix of John G. Watts, deceased, it was, by decree of August, 1902, referred to a commissioner to ascertain and report how much was due to the complainant on account of rents and profits from the estate of his father, and the credits, if any, to which the estate was entitled, and also to ascertain and report how much rent was due complainant, on account of rents and profits, from the defendants, Mrs. F. G. S. Watts and her two sons, D. H. Smith and J. T. Smith, for their alleged use and occupation of the land of complainant, together with any credits to which they were entitled.

The present controversy arises entirely upon the report made in response to this last mentioned decree, and the action of the lower court with respect thereto. These several contentions will now be considered.

We are of opinion that it was not error to dismiss complainant's bill as to the defendants, D. H. and J. T. Smith. As already seen, in 1895 John G. Watts conveyed the residue of his interest in the farm to Mrs. F. G. S. Watts, and after that time and up to 1900, the evidence shows that she controlled and managed the entire property and received the rents and profits of the whole place. It further appears that her sons, the defendants D. H. and J. T. Smith, by her permission and consent, assisted in running the farm, but this was not a sufficient ground for holding them responsible for the use and occupation of the land of complainant by their mother.

We are further of opinion that from the date of the death of Mrs. Hattie B. Watts to the date of the deed conveying the residue of his interest in the farm to the second wife, during which time he received the entire proceeds, John G. Watts oc-

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cupied the relation of *de facto* guardian to his infant son, and, as such, became liable to account for the rents arising from that portion of the land belonging to his son, in accordance with the established rule for the settlement of the accounts of *de jure* guardians. And from the date that she received a deed to the residue of her husband's interest and took possession of the whole farm and received the entire proceeds thereof, Mrs. F. G. S. Watts became the *de facto* guardian of the complainant with respect to that portion of the rents and profits arising from his land, and became liable to a like accounting. These *de facto* guardians must, therefore, account for compound interest upon the complainant's share of the rents and profits received by them, respectively, during the period that each enjoyed the whole estate, for one who makes himself guardian *de facto* is certainly not entitled to be treated with more favor than if he had been legally appointed. *Evans v. Pearce*, 15 Gratt. 513, 78 Am. Dec. 635; *Martin's Admr. v. Fielder, &c.*, 82 Va. 455, 4 S. E. 602; *Garrett v. Carr*, 1 Rob. 208; *Peal's Admr. v. Thurmond*, 77 Va. 753; *Anderson v. Smith*, 102 Va. 697, 48 S. E. 29.

The general rule established by this line of authorities is conceded, but it is contended that they do not apply in this case because the father and his infant son were tenants in common. and that a like relation existed between the complainant and Mrs. F. G. S. Watts; that if liable at all appellees can only be held to account as tenants in common, in accordance with section 3294 of the Code. This position is not, in our view, tenable. *Evans v. Pearce, supra*; *Martin v. Fielder, supra*. In each of these cases the party held liable was tenant in common with infant defendants, and was required to account as *de facto* guardian for the rents and profits arising from the common property which belonged to the infant co-tenants. It is true the subject was not discussed in the opinions delivered

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in these cases, but they were argued by able counsel, and the relation of the parties too plainly appears to admit of the suggestion that such relation was overlooked by the counsel and court.

At common law a tenant in common could not have an accounting from the occupying tenant, in the absence of an express contract, even though excluded from the common property. The statute, sec. 3294, was passed at an early day to change this harsh rule, and to require the occupying tenant to account to his co-tenant for the profits received by him in excess of his just share or proportion. Under this statute an infant tenant in common has the same right that an adult tenant in common has to require the occupying tenant to account; but when he does account his liability is fixed by the same method of calculation with respect to interest that other people are held to who have received and retained the property of an infant. The legislature manifestly did not intend to abrogate the established rights of infants in this regard. The view of this statute, here contended for, would make the Legislature, while curing a palpable injustice imposed by the common law upon tenants in common, destroy the humane and meritorious rights of infants, by putting it in the power of an adult tenant in common to take possession of land in which his interest was small, receive and appropriate for years to his own use rents which belonged almost entirely to an infant co-tenant, and then escape the just liability attaching to a guardian *de facto* upon the ground that he was a tenant in common. No reason is perceived why a father who occupies land as tenant in common with his infant child should not be, at the same time, the *de facto* guardian of the child with respect to its interest in the revenues arising from the common property. It is the child's money that he is putting year by year into his pocket that he is chargeable with as *de facto* guardian. He would have to account for that money each year to an adult co-tenant. If he chooses to keep the in-

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fant's money, and not pay it into the hands of some authorized person, who would be responsible as guardian, then, in fairness to the helpless child, he must be himself treated as guardian.

It must be conceded that if the whole of the common property was rented to a third person and the entire rent was paid to the father, he would be chargeable as *de facto* guardian with the child's share. Why should he not be alike chargeable when, instead of renting out the property, he solely occupies and uses it, and thus receives more than his share?

It is suggested that the interest of the complainant in the land was not accurately ascertained, and for that reason the appellees should not be held to account as guardians *de facto*.

The public records showed with sufficient certainty the number of acres of this farm belonging to the complainant, and the father knew with reasonable certainty where the most valuable portion of such interest was located. But that is certain which is capable of being made certain, and if there was any such difficulty as suggested it could have been easily removed by having the boundary of the child's land ascertained and settled. The child was under the control and management of the father and could do nothing. It was the duty of the father to ascertain the child's interest and have a guardian appointed to receive his share of the rents and profits. Having failed to do this, he must account as *de facto* guardian for the time he received the entire revenues, and Mrs. F. G. S. Watts must account in the same capacity for the time during which she received the entire revenues.

We are further of opinion that in ascertaining the amount for which appellees are respectively liable, the annual rental value of the 284 acres with the improvements should be taken, and not 284/494 of the annual rental value of the whole farm. The decree of the court under which the commissioners acted settled this to have been the land to which complainant's mother was entitled, and the report of the commissioners, which was confirmed without objection, defines it by metes and bounds. This

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could have been as easily done when Mrs. Hattie B. Watts died as now. That it was not done was the fault of those who were using and occupying the land, and they cannot take advantage of this dereliction of duty to the prejudice of the infant heir.

We are further of opinion that the lower court erred in reducing the annual rental value of the 284 acres of land belonging to the complainant from \$1,400.00, as shown by the report of the commissioner, to \$852.00 *per annum*. The decided preponderance of evidence on this subject supports the finding of the commissioner. Inasmuch, however, as it is necessary to re-commit this cause to the commissioner for other purposes, and in order to avoid any possible injustice, the amount due from the appellees on this account will be left open, so that the commissioner may again consider the subject in the light of any additional evidence that may be introduced by either side.

We are further of opinion that in stating the account with John G. Watts, as *de facto* guardian, he should be credited with \$2,886.53, as of October 16, 1901. It is contended that this was a gift, and not a payment on account. John G. Watts being indebted to his son at the time, the presumption is that the money when placed to his credit in bank was intended as a payment on account. To overcome this presumption the evidence must be clear and convincing, and this it is not.

We are further of opinion that it was proper to refuse credit to John G. Watts for the support and maintenance of complainant from 1890 to 1895, during which time he was in possession of the entire farm. It is the common law duty of the father to support his infant child, if able to do so. In the application of this rule the court looks at the circumstances of the particular case, and determines according to the right and justice thereof, having in view the position and wealth of the parties. *Evans v. Pearce, supra*; *Hauser v. King*, 76 Va. 731-736; *National*

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Valley Bank v. Hancock, 100 Va. 101, 40 S. E. 611, 57 L. R.A. 728, 93 Am. St. 933. Applying these principles to the case at bar, there was no error in holding that nothing should be allowed the father on this account.

Nor was there error in the ruling of the lower court that Mrs. F. G. S. Watts should be allowed compensation for the support and maintenance of complainant, and the keep of his horse, from 1895 to 1900, during which time she had possession of the entire farm. During that time the father is shown to have been insolvent and the support of the family appears to have devolved upon Mrs. Watts. Under these circumstances it would be inequitable to require her to pay the complainant rents and profits and not allow her credit for the compensation mentioned.

It is assigned, under rule IX, that the court erred in fixing the amount of this credit at \$150.00 *per annum*, it being contended that the amount allowed is inadequate. As the cause must go back to the commissioner, this item of credit to Mrs. Watts will be left open for further inquiry.

The decree of the lower court properly disallowed any credit for improvements and repairs, and no cross-error has been assigned calling in question this ruling.

We are further of opinion that it is necessary to a proper final decree that this cause be re-committed to the commissioner, who will change his findings upon the two subjects of further inquiry mentioned herein to such extent as he may consider justified by any additional evidence that may be offered with respect thereto; and will further reform his report in the particulars pointed out in this opinion, showing the amount due the complainant from the estate of John G. Watts, deceased, and from Mrs. F. G. S. Watts in her own right, respectively, after the changes indicated have been made.

For these reasons the decree appealed from must be reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

Reversed.

Syllabus.

Wytheville.

POCAHONTAS COLLIERIES CO. v. RUKAS' ADMINISTRATOR.

June 28, 1905.

1. **DECLARATIONS—Numerous Counts—Bill of Particulars.**—A plaintiff may, in different counts of his declaration, allege any number of distinct acts of negligence on the part of a defendant, and the defendant may guard against surprise by calling for a bill of particulars, under Sec. 3249 of the Code, which will be granted in a proper case.
2. **DEATH BY WRONGFUL ACT—Aliens—Right to Sue.**—Resident alien friends are entitled to the benefits and remedies afforded by sections 2902 and 2904 of the Code, giving a right of action for death by wrongful act or neglect. The policy of our laws is to extend rather than abridge the liberal policy of the common law under which an alien friend may sue and be impleaded to the same extent as a citizen.
3. **DEATH BY WRONGFUL ACT—Elements of Damage.**—This court adheres to its former rulings as to the elements of damage which the jury may consider in assessing damages for death occasioned by the wrongful act or neglect of another, and which are embodied in instruction No. 3 given for the plaintiff in this cause.
4. **MASTER AND SERVANT—Safe Place—Special Damages—Fire in Adjoining Mine.**—It is the duty of a mining company to give notice to a miner who is ignorant of the fact of the existence of a fire in an adjoining mine, on a lower level, and connected by cross-cuts with the mine in which he is about to enter, and of which the company has notice. In the case at bar the company knew, or, in the exercise of ordinary care, ought to have known of the dangerous consequences likely to result from such a fire; and if it failed to give such notice it is liable for resulting injuries to the miner. It is the duty of the master to give warning to his servants of all perils to which they will be exposed of which he is, or ought to be, aware, other than such as they should, in the exercise of ordinary care, have foreseen, as necessarily incident to the business, in the natural and ordinary course of affairs.

Statement.

Error to a judgment of the Circuit Court of Tazewell county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

The following are the instructions given for the plaintiff, and referred to in the opinion of the court:

Instruction No. 1.

"The court instructs the jury that it is the duty of an employer to use ordinary care to provide a reasonably safe place in which his employee may perform the service required of him, and to use like care to keep the place reasonable safe so that the employee may not be exposed to unnecessary and unreasonable risks, and the employer is liable for an injury to the employee of which the proximate cause is the failure to exercise this care.

"The care and diligence required of the master in the sense of the rule above laid down, is such as a reasonably prudent man would exercise under like circumstances, to protect his servant from injury, having in view the character of the service required, and the dangers, if any, to be apprehended by a reasonably prudent man in the exercise of ordinary diligence, and extends to every portion of the place in which the employer's business is conducted, from which danger is reasonably likely to result to the employee's injury, unless ordinary care is used for his reasonable safety."

Instruction No. 2.

"If the jury shall believe from the evidence that changes occurred in the character of the condition of the Baby Mine of the defendant company which rendered it reasonably probable that the safety of the West Mine in which the plain-

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tiff's intestate worked would be dangerously affected thereby, and that injury or death to plaintiff's intestate would likely result therefrom as a reasonable and probable consequence, and if the jury further believe from the evidence that the defendant company knew, or in the exercise of ordinary care and judgment ought to have known, these facts in time to have warned plaintiff's intestate of such danger, then it was the duty of the defendant company to have used reasonable care and diligence to warn the plaintiff's intestate of the danger or to have taken other reasonable precautions to protect him from the danger; and if the jury should further believe from the evidence that the defendant company failed to discharge its duty as above set forth and that its failure so to do resulted in the death of plaintiff's intestate as a proximate cause, then the plaintiff is entitled to recover in this action, provided the jury should further believe from the evidence that plaintiff's intestate himself exercised ordinary care and judgment under all the circumstances surrounding him.

"And the court instructs the jury in this connection that the duty of the employer to warn his employee exists only where there are dangers the employer knows of, or ought by the exercise of ordinary care and judgment to know of, and which he has reasonable grounds to believe that his employee does not know of, or could not discover in time to protect himself from injury, by the use of ordinary care and prudence."

Instruction No. 3.

"If you believe that the plaintiff is entitled to recover in this case under the law and the evidence, then in ascertaining the damages of the plaintiff you may consider:

"First: The pecuniary loss sustained by the widow and infant children of Anton Rukas, by his death, fixing the same at such sum as would be equal to the probable earnings of the said Anton Rukas taking into consideration the age, business capacity, experience, and health of the deceased, during what would probably have been his lifetime had he not been killed.

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“Second: By adding thereto compensation for the loss of his care, attention and society to his widow and children.

“Third: By adding such further sum as you may deem fair and just by way of solace and comfort to his said wife and children for the sorrow, suffering and mental anguish occasioned to them by his death.”

Instruction No. 4.

“The court instructs the jury that if the defendant company relies upon contributory negligence of plaintiff’s intestate to defeat a recovery in this case, then you are instructed that the burden is upon the defendant to establish such contributory negligence, unless you should believe that such contributory negligence appears from the evidence of the plaintiff in this case.”

J. H. Fulton and Rucker, Anderson & Hughes, for the plaintiff in error.

Chapman & Gillespie and J. H. Stuart, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This action was brought to recover damages for the death of plaintiff’s intestate, Anton Rukas, which is imputed to the negligence of the defendant.

On the morning of November 14, 1901, Rukas, while at work as a collier in the service of the defendant, in one of its mines located near the town of Pocahontas, was overcome and suffocated by smoke and gases generated from fire in an adjoining mine, and conveyed into the mine in which he was employed through connecting galleries.

There was a verdict and judgment for plaintiff, and the defendant brings error.

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The first assignment of error relates to the action of the court in overruling the demurrer to the declaration, the objection being that it charges various grounds of negligence, to each of which the accident is proximately ascribed, thus leaving the defendant unapprised of the particular act of negligence which it is called upon to answer.

This objection affords no sufficient grounds for demurrer. It is permissible under the practice in this jurisdiction for the plaintiff to allege any number of distinct acts of negligence, and the defendant may guard against surprise by resort to the provisions of section 3249 of Va. Code, 1904, which, in a proper case, entitles him to demand a more specific statement of the real ground of complaint. *City of Richmond v. Leaker*, 99 Va. 1, 37 S. E. 348; *Wood v. Am. Natl. Bank*, 100 Va. 306, 40 S. E. 931.

The second assignment of error involves the ruling of the court in sustaining the motion of the plaintiff to reject a plea of the defendant, which denies the right of the personal representative of a non-resident alien to maintain an action for his death under section 2902 of the Code.

At common law, an alien domiciled in a country is entitled to the protection of its laws, and in return therefor owes temporary allegiance to the country of his adoption during the period of his residence. He is subject to the law, as well as entitled to its protection, and is liable to be tried and punished for crime; and may sue and be impleaded in the proper courts to the same extent as a citizen. The general doctrine is stated thus: "While the rights of aliens depend entirely upon the municipal law of the State or nation, or the rights which are given aliens by international law, in the United States, except as to certain political and municipal rights to which citizens only are entitled, resident alien friends have practically all and the same rights and privileges as citizens. These rights and privileges include both personal rights—such as the right to dwell safely in the country, and the right of protection to person, reputation and other relative rights—and property rights." 2 Cyc. 89, and authorities cited.

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In the same volume, at page 108, it is said: "So also, it has been held that an alien might maintain an action for statutory damages or penalty for death by wrongful act." Many of the cases bearing on that question are there referred to.

Alien friends are included in our statute of descents, and by section 43 of the Code, are permitted to acquire by purchase or descent, and hold and transmit real estate in the same manner and to the same extent as a citizen. These statutes indicate an intention on the part of the Legislature to extend rather than abridge the liberal policy of the common law with respect to aliens.

An examination of the authorities relied on to sustain the overruled plea shows that the decisions are controlled by the status of the parties entitled to the recovery in an action for death by wrongful act, rather than by that of the decedent in his lifetime. The distinction is sharply drawn between the rights of *non-resident* and of *resident relations* of the deceased.

Thus, in the leading case of *McMillan v. Spider Lake, &c.*, Co., 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589, 95 Am. St. 947, it is held that non-resident alien relations of the deceased are not entitled to the benefits of the Wisconsin statute giving a right of action in such case. This case reviews the authorities, English and American, on the subject, and in all of them the above mentioned distinction seems to be observed.

So also, in the case of *Deni v. Penn. R. R. Co.*, 181 Pa. St. 525, 37 Atl. 558, 59 Am. St. 676, a case much relied on by the defendant, it is said that "a non-resident alien mother has no standing to maintain an action against a citizen of Pennsylvania to recover damages for the death of her son." The opinion proceeds: "Our statute was not intended to confer upon non-resident aliens rights of action not conceded to them or to us by their own country, or to put burdens on our own citizens to be discharged for their benefit. It has no extra-territorial force, and the plaintiff is not within the provisions of it. While it is possible that the language of the statute may admit of a

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construction which would include non-resident alien husbands, widows, children and parents of the deceased, it is a construction so obviously opposed to the spirit of the statute that we cannot adopt it."

The weight of authority in this country, however, maintains the right even of non-resident alien relatives of the deceased to receive the benefit of these statutes.

In the case of *Mulhall v. Fallows*, 179 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. 309, Holmes, C. J., in delivering the opinion of the court, observes: "One or two cases may be found where a general grant of a right of action for wrongfully causing death has been held to confer no rights upon non-resident aliens. *Deni v. Pennsylvania R. R. Co.*, 181 Pa. St. 525 (*supra*); *Brannigan v. Union Gold Mine Co.*, 93 Fed. 164. But compare *Knight v. West Jersey R. R. Co.*, 108 Pa. St. 250, 56 Am. Rep. 200. On the other hand, in several states the right of the non-resident to sue is treated as too clear to need extended argument. *Philpott v. Missouri Pac. R. R. Co.*, 85 Mo. 164; *Chesapeake, &c., R. R. Co. v. Higgins*, 85 Tenn. 620, 4 S. W. 47; *Augusta Ry. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406; *Luke v. Calhoun County*, 52 Ala. 115. . . . In all cases the statute has the interest of the employees in mind. It is on their account that an action is given to the widow or next of kin. . . . We cannot think that workmen were intended to be less protected if their mothers happen to live abroad . . . In view of the very large amount of foreign labor employed in this State, we cannot believe that so large an exception was silently left to be read in." See to the same effect *Kellyville Coal Co. v. Petrattis*, 195 Ill. 215, 63 N. E. 94, 88 Am. St. 191.

None of these cases question the right of resident aliens (by which is meant aliens domiciled in the United States in contradistinction to those residing in foreign countries) to the benefit of these statutes.

In this case, if the averments of the plea were sufficient

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to present the issue intended to be raised, the evidence shows that the widow and one of the children of the deceased reside in the State of West Virginia. The question, therefore, of the right of a non-resident alien to maintain this action does not arise, and upon that question no opinion need be expressed. But the right of a resident alien to the benefits and remedies afforded by sections 2902 and 2904 of Va. Code, 1904, is sustained by authority, and is in accordance with sound policy and justice, and this court has no hesitancy in upholding it in the present case.

The third assignment of error is in respect to the ruling of the court in giving the four instructions asked for by the plaintiff.

These instruction enunciate no new principles, they correctly propound the plaintiff's theory of the case, and there was evidence tending to sustain them. Upon familiar principles, therefore, they were properly given.

With regard to the instruction as to what constitute proper elements of damage in this class of cases, it is conceded that the instruction conforms to the decisions of this court, but a different rule is invoked as being, it is alleged, more in harmony with the weight of authority in other States.

It is sufficient to say that the court has recently had occasion to consider that question, and no sufficient reason is perceived to justify a departure from its own precedents. *Portsmouth St. R. Co. v. Peed's Admr.*, 102 Va. 662, 47 S. E. 850.

The instructions given by the court, as a whole, correctly and fairly submitted the law of the case to the jury, and a more detailed notice of them would be unprofitable.

The *gravamen* of the charge in the third count of the declaration, the one that presents the controlling issue in this case, was the negligent failure of the defendant, on the morning of the accident, to notify plaintiff's intestate, that connecting mines with the one in which he was accustomed to work were on fire, and of the consequent danger of entering that mine. The significance of that allegation will be appreciated in con-

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sidering the fourth and last assignment of error, namely: the action of the court in overruling the motion of the defendant to set aside the verdict of the jury on the ground that it was contrary to the law and the evidence.

The salient facts, which for the purposes of this appeal must be taken as true, are as follows: In November, 1901, and for a number of years prior thereto, the defendant operated extensive coal mines in the vicinity of Pocahontas. The mines particularly referred to in the record are, the New Baby mine, the Old Baby mine, and the West mine, lying parallel and contiguous to each other, and in the order named. The territory occupied by these mines is three miles in length, and a mile and a half in width, and embraces a surface area of 3,000 acres. The map exhibited with the record discloses a perplexing labyrinth of entries, cross-entries, air courses, and traveling ways, some of which are several miles in length, and extend entirely through the mountain. These passages are ventilated by two suction fans, located respectively near the mouths of the fan entries of the New Baby mine, and the West mine. The New Baby mine is located about half a mile from the town of Pocahontas; and the distances from the drift-mouth of that mine to the drift-mouth of the West mine is between a half and three-quarters of a mile. The Old Baby mine had been abandoned and its main passageway, for the distance of nine hundred feet, is used as the approach to the New Baby mine; the passageway to the former near the junction of the two mines was closed with a wooden brattice, which separated the old mine from the new.

On November 14, 1901, at three o'clock in the morning, a fire was discovered in the fan of the New Baby mine, which was extinguished in about one hour, but the fan was disabled and not operated again that day. About four o'clock, a large fire was discovered in a pile of coal at the junction of the Old Baby mine and the New Baby mine; and three other fires were also found burning in the courses leading to the burnt fan. At five o'clock there was an explosion in the burning mine, which

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destroyed the brattice referred to, and afforded an outlet for the gases and smoke into the Old Baby mine, whence they were carried through cross-cuts to the high levels of the West mine. The origin of these fires is unknown, nor is it material in the view which the court takes of the case.

It was a rule of the company to issue checks to its employees every morning from a check office located near the Baby mine. These checks were slips of paper with which the miners tagged loaded coal cars so that each might receive credit for the number of car loads of coal to which he was entitled.

On the morning of the accident, plaintiff's intestate, with his brother and a miner named Sprengoski, set out from their home in Pocahontas to go to their place of work, at about twenty minutes to six o'clock; and having received their checks, at the usual hour, about 6:15 o'clock, entered the West mine at the main entrance. After proceeding some distance in the mine, they discovered smoke, but Sprengoski, who was an experienced miner, was unable to determine whether it came from the local—a small steam engine used in hauling coal cars in and out of the mine—or from the adjoining mine.

Shortly after these men had gone in to their work, one of the company's mining engineers, who had been ordered by the superintendent to ascertain the condition of the West mine, met and turned back twenty or thirty men, miners and mule drivers, who had entered the mine, and it was not until after that occurrence that a man was stationed at the drift-mouth to warn people of the danger.

Plaintiff's intestate had no knowledge of these fires. He had only been in the service of the company three or four months, and his work had been confined to a section of the mine known as Gray heading, two and a quarter miles from the drift-mouth of the main entry. Sprengoski worked at Fort Wayne, which is a shorter distance from the drift-mouth than Gray heading, and the Rukas brothers parted with him at that point. When that part of the mine began to fill with gas and smoke, he escaped through an opening near his place of work with which

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he was familiar, while the Rukases sought safety in flight along the route by which they had entered, the only one known to them, but were overcome before reaching the outside and perished.

As observed, the officials of the company learned of the condition of affairs at the mines soon after the first fire was discovered; and after extinguishing the fire at the fan, they had been in vain attempting to control the fire in the Baby mine for some two hours before plaintiff's intestate and his companions entered the West mine. They knew that several hundred men composed the day shift in that mine, and that their hours of labor commenced between six and seven o'clock. They also knew, or in the exercise of ordinary care ought to have known, of the dangerous consequences likely to result from an uncontrollable fire in a gaseous coal mine to an adjoining mine on a higher level, and connected by cross-cuts with the burning mine. Such conditions imperatively demanded prompt measures for the safety of employees.

The duty of the defendant to warn plaintiff's intestate of the changed conditions and the certain peril to which he would be exposed by continuing to work in the mine is corollary to the primary duty of exercising ordinary care to furnish him a reasonably safe place in which to work in the first instance. The main principle has repeatedly received the sanction of this court, and the subordinate proposition seems also to be well settled.

The doctrine is stated as follows, by Sherman & Redfield: "The master must, therefore, give warning to his servants of all perils to which they will be exposed, of which he is, or ought to be, aware, other than such as they should, in the exercise of ordinary care, have foreseen as necessarily incidental to the business, in the natural and ordinary course of affairs; though more than this is not required of him." 1 Shearman & Red. on Neg. (5th Ed.), sec. 203.

In note 5 to that section, it is said: "An employer is bound to give notice of latent dangers among which the employee is required to work, and of which the employer has knowledge."

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See also 1 Labatt on Master & Servant, sec. 240; *Galveston, &c. R. v. Garrett* (Tex.), 13 S. W. 62, 15 Am. St. Rep. 781; *Parkhurst v. Johnson* (Mich.), 15 N. W. 107, 45 Am. St. Rep. 28; *Smith v. Peninsular Car Works* (Mich.), 27 N. W. 662, 1 Am. St. Rep. 542; *McDonald v. Chicago, &c. R. Co.* (Minn.), 43 N. W. 380, 16 Am. St. Rep. 711; *Johnson v. First Nat. Bank* (Wis.), 48 N. W. 712, 24 Am. St. Rep. 722.

In *Michaels v. Roanoke Mach. Wks.*, 90 Va. 492, 19 S. E. 261, 44 Am. St. 927, this court says: "Accordingly, the servant has a right to assume, when placed in a situation of danger, where engrossing duties are required of him, that the master will not, without proper warning, subject him to other perils unknown to him, and from which the work exacted necessarily distracts his attention."

The questions of negligence and contributory negligence were submitted to the jury upon correct instructions, and viewing the case from the standpoint of a demurrer to the evidence, the evidence is quite sufficient to establish the fact that the negligence of the defendant was the proximate and efficient cause of the death of plaintiff's intestate.

The judgment of the Circuit Court is without error, and must be affirmed.

Affirmed.

Syllabus.

Wytheville.

DUNN AND OTHERS V. STOWERS AND OTHERS.

June 28, 1905.

1. **MARRIED WOMEN—Statutory Separate Estate—Contract to Sell.**—A contract by a married woman, in which her husband unites, for the sale of her statutory separate estate acquired under the act of April 4, 1877, may be enforced in equity either for or against her.
2. **SPECIFIC PERFORMANCE—Tender of Deed.**—When the vendee of land calls upon the vendor by bill for that purpose; to exhibit his title so that the purchaser may accept it if found to be good, or have the contract rescinded if bad, it is not necessary that the vendor shall be able to make a complete deed at the time he files his answer. It is sufficient if, with the aid of the court, he can tender a marketable title at the hearing.
3. **MARRIED WOMEN—Statutory Separate Estate—Contract to Sell—Code, S.c. 2502.**—Section 2502 of the Code relating to the effect to be given to certain conveyances made by married women and the covenants therein contained does not in any way prohibit her from contracting to sell her statutory separate estate, or inhibit or interfere with a court of equity in the enforcement of such contracts.
4. **EQUITY—Specific Performance—Parties—Cross-bill—Complete Relief.**—Where husband and wife have contracted to sell their joint lands to a purchaser, who gives bond payable to the husband only, and a bill is thereafter filed by the purchaser against the husband and the heirs and distributees of the wife, asking that they exhibit their title so that the purchaser may accept it if good and reject it if bad, and no question is raised about the right of the husband to collect the whole purchase-money, either by the purchaser or the distributees of the wife, the personal representative of the wife is not a necessary party to the suit, and no prayer that the answer of the husband and distributees of the wife be treated as a cross-bill is necessary to enable the court, upon being satisfied that the title is good, to ascertain the balance due on the purchase price and give a decree therefor against the purchaser. Upon reference to a commissioner in such case to report on the condition of the title, and also to report anything else deemed pertinent by himself, or required by any party in interest, it is not error for the commissioner to report the balance of purchase money due the vendor, and where such report is confirmed by the trial court with-

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out exception on that account, no objection thereto can be raised in this court, especially when there is no suggestion of error in the calculations made or the amount reported by the Commissioner. When a court of equity has once acquired jurisdiction of a cause on equitable grounds, it will go on and do complete justice between the parties.

5. *DEED—Signature by Woman—Presumption as to Life of Husband.*—Where a purchaser of land has been in the continuous, actual, open and exclusive possession thereof from the date of the conveyance to him, and the conveyance is perfect on its face and no adverse claim to the land has been asserted by anyone, it will be presumed that a woman who had been married but who signed the deed as grantor more than thirty years ago had no husband living at the date of her conveyance.
6. *SPECIFIC PERFORMANCE—Doubtful Title—Title by Adverse Possession.*—A purchaser will not be compelled, in equity, to accept a doubtful title, but he may be compelled to accept one resting upon a hostile, adverse, and uninterrupted possession under color of title which has continued a sufficient length of time to bar the rights of any possible claimant.
7. *VENDOR AND PURCHASER—Warranty by Vendor's Heirs—Waiver.*—A purchaser of land cannot refuse to accept the deed and warranty of the vendor's heir, where, after the death of the vendor, he recognizes the contract as still binding on him, retains possession and makes payments, and there has, in the meantime, been great depreciation in the value of the land, and he has made no objection to the title until sued for the purchase-money.

Appeal from a decree of the Circuit Court of Bland county.
Decree for defendants. Complainants appeal.

Affirmed.

The opinion states the case.

J. H. Fulton, Fulton Kegley and R. W. Williams, for the appellants.

Henry & Graham, for the appellees.

CARDWELL, J., delivered the opinion of the court.

James M. Stowers, the principal appellee here, and Mary U. Stowers, his wife, spoken of in this record as Polly M. Stowers, owned and occupied three contiguous tracts of land situated in the county of Bland, one containing 202 acres, another 39¾ acres, and the other 93 acres; and they had been in the pos-

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session of these lands for years prior to the contract for their sale hereinafter mentioned. Mrs. Stowers acquired 9/14 of the lands as the sole heir at law of her father, Joseph Lambert, who died in March, 1880; and James M. Stowers acquired title to the residue of the lands by conveyances to him from parties who acquired title from Elijah Lambert, who owned jointly with his brother Joseph the said lands, and died prior to the death of Joseph Lambert.

On the 5th of September, 1890, James M. Stowers and wife entered into a written contract, commonly known as a title bond, with appellants, whereby they agreed and bound themselves to sell to Dunn and his associates the said tracts of land for a consideration of \$4,000, which was to be paid to James M. Stowers alone, and for which sum, divided into three equal payments, bonds were executed by Dunn and his associates to James M. Stowers, payable respectively on May 1, 1891, November 1, 1891, and May 1, 1892. The contract or title bond stipulated that the two first named tracts of 202 acres and 39 $\frac{3}{4}$ acres, were to be conveyed to the vendees with covenants of general warranty, and the other tract of 93 acres to be conveyed with special warranty—that is of such right, title, and interest therein as Stowers and wife had.

In May, 1891, Stowers and wife surrendered the land to appellants, who have been in possession thereof continuously from that time.

A number of payments were made upon the several bonds, between May 1, 1891, and July 2, 1895, but none of them paid in full; all of which payments were made to James M. Stowers, and several of them made after the death of Mrs. Stowers, which occurred on January 5, 1893. Although repeatedly and earnestly importuned by James M. Stowers to pay the balance due on these notes, appellants paid nothing thereon after the last payment above mentioned in July, 1895, and on the 29th day of September, 1896, another contract was entered into between the appellants, as parties of the first part, and James M. Stowers, of the second part, which recites that the parties of

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the first part had purchased the lands (as hereinbefore stated), since which time Stower's wife had died, leaving the title in doubt, and it was agreed that Stowers should bring a suit in the Circuit Court of Bland county for the collection of the purchase money still due him—"said suit is not to be defended by said purchasers, except to present the law of the case based upon the exact facts as to the status of said title, and shall abide by said decision of said court, and are to pay the costs of said suit; and should said court decide that said Stowers cannot make a good title to said land, then the said parties hereto are still to try all honorable and fair means to adjust the said questions in the premises, and if they cannot agree on a basis of settlement then they are to leave the matter to arbitration upon the terms as follows:" . . .

Stowers then brought his suit at law on the purchase money bonds, and thereupon appellants, without making any appearance in that suit, as stipulated for in the contract just referred to, filed this bill in equity against James M. Stowers and the children of himself and his wife, Polly M. Stowers, deceased, praying an injunction to supersede the action at law; that the defendants might produce before the court the title of James M. Stowers and wife to the lands, "that the same might be inspected by the court; and that all questions concerning the title to the lands might be adjudicated, so that if good your orators might have proper conveyances executed, and if not good the said contract (of September 5, 1890,) be rescinded."

Polly M. Stowers left five children, two of whom were under the age of twenty-one years at the time of her death. James M. Stowers and his three adult children filed an answer to said bill, setting out all of the facts hereinbefore mentioned and others, denying all allegations of the bill not specifically admitted to be true and claiming that the title to the lands in question was entirely good, exhibiting with the answer the title deeds therefor, and also a deed duly executed and acknowledged by James M. Stowers and four of his children, three of whom

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were then adults, and tendered the deed for delivery to appellants upon the purchase money for the lands being paid in full by them, which deed conformed to the provisions of the contract of sale as to covenants of title, to which answer appellants filed a general replication. A guardian *ad litem* was duly appointed for the infant defendants, and they and the guardian *ad litem* filed their answer to the bill. Upon these pleadings the Circuit Court made its decree of January 29, 1900, referring the cause to W. B. Kegley, who was appointed special commissioner for the purpose, to inquire into and report fully all the facts connected with the title to the lands in question necessary or material to enable the court to pass upon the question of the validity thereof, whether said title was good or bad, and if defective in what respect; and to report anything else deemed pertinent by himself, or required by any party in interest.

The cause dragged along before Commissioner Kegley until October 7, 1903, when he filed a very full and satisfactory report in response to the decree of reference, taking the ground that the title to the lands in James M. Stowers and his children was good, unless the following matters suggested by him impair its validity, viz.:

1. Mary Kensil, one of the heirs of Elijah Lambert sold her 1/7 interest in the land to James M. Stowers, and having died before making a deed thereto, her interest was afterwards conveyed by John Kensil, her husband, and A. W. Shewey and Anna, his wife, James Crabtree and Agnes, his wife, and Barbara Scott, the deed bearing date October 14, 1868; and the defect suggested by the commissioner is: "It does not appear on the face of this deed that the grantors are all the heirs at law of Mary Kensil, neither does it so appear from the evidence in the case, unless the statement of Mr. Stowers that this interest was conveyed to him by the heirs of Mary Kensil is sufficient on this point. It would seem that Barbara Scott, one of the

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grantors, was or had been married, but it does not appear whether her husband, if she had been married, was living or not at the time of the execution of the deed. There is no evidence, so far as I can find, in the record on this point."

2. James M. Stowers acquired a $\frac{2}{7}$ interest in the lands in question from one James R. Bales, and the deed therefor was all sufficient and duly recorded. One of these $\frac{1}{7}$ interests was acquired by Bales from Margaret Perkey, a sister of Elijah Lambert, deceased, by deed of release and quit claim, dated October 7, 1869, duly executed and recorded. The suggestion of defect made by the commissioner is, "it appears in the evidence that Margaret Perkey was married, but it does not appear whether her husband was living at the time of the execution of this deed. If he was living, then he should have united in the deed."

In the first suggestion is involved the possible right of curtesy in the husband of Barbara Scott in $\frac{1}{4}$ of $\frac{1}{7}$ of one half of the land; and in the second is involved the possible right of curtesy in the husband of Margaret Perkey in $\frac{1}{7}$ of one half of the land.

Commissioner Kegley, as he was authorized by the general clause of reference in the decree, at the request of counsel for James M. Stowers and children, made and filed as a part of his report a statement showing the balance due to James M. Stowers on the said bonds of appellants to be \$1,258.79, with interest on \$785.62 from October 7, 1903.

The cause coming on to be heard upon the pleadings and exhibits therewith, and theretofore considered, and the report of Commissioner Kegley and the depositions and exhibits therewith, the Circuit Court made its decree of December 7, 1903, appealed from, which holds, "that the contract for the sale of the lands in the bill and proceedings mentioned, and executed between the complainants and James M. Stowers and wife, dated the 5th day of September, 1890, is valid and enforceable, notwithstanding the death of Mrs. Stowers; that any question

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of the loss of the general warranty of the wife, if ordinarily sufficient to bar specific performance was waived by complainants who after her death recognized the contract as subsisting by retaining the possession of the land and making payments thereon." And the court being of opinion that it should settle the entire controversy in the cause, and not remit either party to any remedy at law, proceeded to decree further as follows: That said report of Commissioner Kegley be confirmed; that the title of the said land is good and marketable, and that the contract for the sale of said land be specifically enforced, and to that end that James M. Stowers recover of appellants (complainants below) the sum of \$1,258.79, with interest on \$785.62 from October 7, 1903, and the costs of this suit, for which said James M. Stowers might have execution when the deeds therein-after referred to are executed and filed with the papers in the cause, said sum decreed being the balance of the purchase money due for the land, as shown by Commissioner Kegley's report. And, further, that James M. Stowers and his children, heirs at law of Mary M. Stowers (Polly M. Stowers), having executed and filed with their answer a deed to said land, conveying the same to said purchasers, the clerk of the court is directed to deliver same when the purchasers pay the decree therein-before rendered against them for purchase money, but as two of said grantors, viz.: Rufus M. Stowers and Samuel C. Stowers, were infants at the time of the execution of said deed. W. J. Henson was appointed a special commissioner, who as such should execute a deed conveying the interest of the said Rufus M. and Samuel C. Stowers in said land to said purchasers, and if either of them should have attained the age of twenty-one years such one should join in the deed conveying with general warranty the tracts of land mentioned in said contract, which provided for conveyance with general warranty, and with special warranty the tract for which the contract provided for conveyance with special warranty.

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Pursuant to the decree Rufus M. Stowers, who had attained full age, and W. J. Henson, commissioner, duly executed and filed with the clerk of the court March 17, 1904, a deed, as required by the decree.

As we have seen, Polly M. Stowers acquired title to 9/14 of the lands which are the subject of this suit, by descent from her father, who died in March, 1880, the title to which came to her, as Commissioner Kegley reports, "perfect and free from question," and counsel for appellants now concede in their reply brief that under the law as it stood at the date of the contract of September 5, 1890, a married woman could make a valid sale of her statutory separate estate. This being conceded, it is settled that a contract made by a married woman for the sale of her separate estate may be enforced in a court of equity in suits for or against her. This was done in *Gentry v. Gentry*, 87 Va. 478, 12 S. E. 966, where the contract was entered into between the parties on the 3rd day of July, 1888, and whether the estate the married woman contracted to sell was an equitable or a statutory separate estate does not appear from the reported case, but it does appear that it was her separate and sole property, and this court affirmed the decree of the Circuit Court enforcing specific execution of the contract.

In *Va. Coal & Iron Co. v. Roberson*, 88 Va. 116, 13 S. E. 350, the land in controversy was the separate estate of the wife, acquired under the statute enacted April 4, 1877, known as the "Married Woman's Act," and there was a deed made by Roberson and wife to Chas. W. Kilgore, dated the 1st day of March, 1880. The acknowledgment of the parties thereto being found defective, Roberson and wife refused to perfect it. Suit was brought against them by the owners of the land to compel a perfection of the deed, which suit was resisted by Roberson and wife, who made the contention that the wife could not be made to execute a deed. The court held that the certificate was imperfect, but that the imperfect deed constituted a contract under the married woman's act, and specific performance could be

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enforced. It therefore reversed the lower court and decreed that the married woman should be compelled to make a proper deed, and upon her failure or refusal to do so the court could have a commissioner execute a deed so as to conclude her rights.

And in the case of *Clinch River Veneer Co. v. Kurth*, 90 Va. 737, 19 S. E. 878, it was also held that the married woman's deed therein involved was defective, but was enforceable in equity as an executory contract. This case came under review in *Giel v. Giel*, 101 Va. 773, 45 S. E. 325, where the court declared that the opinion in the case of *Clinch River Veneer Co. v. Kurth*, *supra*, was not sound so far as it held the certificate of the deed therein involved to be defective, and held a certificate with a similar omission to be good; but no disapproval was announced as to the fact that such a deed, if defective, might be treated as an executory contract, upon which a suit might be prosecuted for specific performance of the contract.

Wood v. Walker, 92 Va. 27, 22 S. E. 523, is cited as authority for the proposition that a good title must be shown and a valid deed tendered in order to authorize the specific enforcement of a contract for the sale of land; but that case has no bearing upon the case in hand. In a case where the rule in *Wood v. Walker* applies, the court will not execute a contract at the instance of a vendor unless the deed is made, and where the vendor has the initiative, as in that case, he should do all the court could require him to do by his pleadings in the beginning. As remarked by counsel for appellees, there are many cases where specific performance may be sought, where it would be impossible to file a perfect deed until the court had passed upon the rights of the parties and declared the kind of deed necessary to be made, or where the court through a commissioner could carry out its decree.

In this case appellants called upon appellees to exhibit their title to the court in order that it might be inspected by the court, and all questions concerning the title might be adjudi-

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cated, so that if good appellants might have proper conveyances executed, and if not good that the contract by which Stowers and wife agreed to sell to them the lands be rescinded and the purchase money theretofore paid refunded. With their answer, as we have seen, appellees tendered a properly executed deed for the land to the extent of the interest of Stowers and all of the children and heirs of Polly M. Stowers, his wife, with the exception of two, who were then under age; and the decree of the court provided for a proper conveyance from these two of their interest in the lands to the appellants, thus vesting in them a good and marketable title to the lands, if the defects in the title suggested by Commissioner Kegley did not exist, as to which we will have more to say later.

Counsel for appellants seem to think that they could not acquire title to the lands without a deed executed by Stowers and his wife, as required by section 2502 of the Code, since married women can only convey title to their estate according to statutory requirements, and *Augusta National Bank v. Beard*, 100 Va. 687, 42 S. E. 694 is cited as authority for the proposition. It is true it was held in that case that the married woman's law does not by implication repeal section 2502; but all that was decided is that section 2502 could have no other interpretation given to it than that it frees a wife from liability on a covenant of warranty contained in the conveyance as completely as did the prior statute, except when made with reference to her separate estate as a source of credit, and no reference being made in the deed to the wife's separate estate, it was as if there were no covenant of warranty therein contained, so far as the wife was concerned. It cannot be maintained that this statute would prohibit a married woman from carrying out her executory contracts, or inhibit or interfere with a court of equity in enforcing against her her contracts with reference to her separate estate, for if such was the case the greater portion of the married women's acts would be absolutely nugatory.

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Polly M. Stowers was bound by her contract, enforceable in a court of equity, to convey her interest in the lands to appellants, and all that a deed from her husband and herself, executed as provided by section 2502, would have availed the appellants, and which they lost by her death, was her contingent right of dower in that portion of the lands which belonged to her husband; and this is obviated by the fact that she was dead when title to the lands was tendered to appellants by the deed from Stowers and the adult children, and that of the guardian *ad litem* for the infant.

By appellants' second assignment of error they assert that the personal representative of Polly M. Stowers should have been before the court when the decree was rendered, and that such personal representative had a substantial interest in the case.

The bill was filed by appellants for the purpose, primarily of enjoining an action at law which had been instituted against them on the purchase money bonds executed by them to James M. Stowers for the land in controversy, with the further prayer that the defendants exhibit title to the lands, etc., and they seem not then to have regarded the personal representative of Polly M. Stowers as a necessary party to this suit, as he was not made a party. Nowhere and at no time throughout the proceedings in this suit have appellants questioned the right of James M. Stowers to receive the purchase money. Polly M. Stowers in signing the contract stipulated that the money should be paid to him, and by it she and those claiming under her as her heirs and distributees were bound, so far as appellants were concerned. Why this was done we know not, nor need it be known, as she had a perfect right to give the money to her husband if she so desired, and she had the right to contract with them so as to bind them to pay it to her husband, as she did. Her children and her distributees were before the court and none of them disputed the right of their father to receive the money.

In *Strother v. Hull*, 23 Gratt. 652, which was a suit for a

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settlement of an administration account and the distribution of the estate, it was contended that as one of the legatees died a minor and the personal representative was not before the court, it was certainly irregular to proceed to a distribution of the estate of the deceased minor, although she died a minor, intestate and unmarried, without bringing her personal representative before the court, but the court held that to have brought the personal representative of the deceased party before the court would have been the merest matter of form, as all the parties beneficially interested in the estate were before the court, and it was not pretended that there were outstanding debts to collect or to pay other than the estate in the hands of appellant, and no one could be injured by the absence of the personal representative of the deceased party interested.

In the case at bar, it has not been suggested that there were outstanding debts due to Polly M. Stowers to be collected, or debts against her to be paid, and we can see no reason whatever why her personal representative should have been made a party.

Under the third assignment of error it is urged that the Circuit Court erred in sustaining so much of Commissioner Kegley's report as reported a balance due on the purchase money bonds, because no such question had been raised in the pleadings in the cause and this question had not been submitted to the commissioner.

There was no exception taken to Commissioner Kegley's report and the general clause of reference in the decree was ample to authorize the statement in his report, made at the instance of a party to the cause, showing a balance due on the bonds payable to James M. Stowers.

The rule in such cases as laid down in *Walters v. Bank*, 76 Va. 12, and sanctioned in numerous cases following, is that when a court of equity has once acquired jurisdiction of a cause on equitable grounds, it may go on to a complete adjudication, even to establish legal rights which would be otherwise beyond the scope of its authority.

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As was said in the opinion in *Parker v. Dee*, 2 Chy. Cas. 200, "when this court can determine the matter, it shall not be a handmaid to other courts, nor beget a suit to be ended elsewhere."

In this case the jurisdiction of the court was invoked by appellants, and in it the court took jurisdiction of all the parties interested and the subject matter of litigation; and the appellants cannot be heard to deny the jurisdiction of the court to settle all matters in controversy between the parties in accordance with the well established rule which we have just quoted. Especially are they not to be heard to question in this court the authority of the Circuit Court to ascertain and determine the amount due from them on their purchase money bonds for the subject matter of the litigation, when there is no suggestion of error in the calculation made and reported by the commissioner, whose report was confirmed without exception.

The fourth assignment of error relates to the suggestions made by the commissioner as to the deeds from John Kensil and others to James M. Stowers, and from Margaret Perkey to James Bales.

Through all the delay in the payment of the purchase money for the lands in question, and the many interviews between appellants and James M. Stowers, they made no suggestion whatever that they objected to the title to the lands, until threatened with a suit on their bonds by James M. Stowers, and in addition to this they nowhere during the taking of depositions, and when they were afforded an opportunity to do so, made inquiry as to whether Barbara Scott or Margaret Perkey were married at the date of the deeds in question. The conveyance of the Kensil interest was made to James M. Stowers on the 14th of October, 1868, which was about thirty years before the institution of this suit, and more than thirty-five years before the final decree rendered therein, and from the testimony of James M. Stowers, which is not contradicted, he had been in possession of this land ever since he bought it. The conveyance of Margaret Perkey to James Bales bears date the 17th day of Sep-

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tember, 1869, about thirty-four years before the final decree in this cause. So that James M. Stowers and the appellants together had continuous, actual, open and exclusive possession of the lands conveyed by Barbara Scott and Margaret Perkey for more than thirty years before this suit was brought. These facts and circumstances, together with the further fact that the deeds executed by Barbara Scott and Margaret Perkey are perfect upon their face, raise, we think, a presumption that neither of them had a husband living to join in the deeds.

Maupin, in his work on Marketable Title to Real Estate, section 292, says: "A purchaser may be compelled to take a title resting upon a hostile, adverse and uninterrupted possession under color of title which has continued a sufficient length of time to bar the rights of any possible adverse claimant."

The same author, at p. 703, discussing title dependent upon adverse possession, where a vendor relies on the statute of limitations to cure a defect in his title which is contested by his vendee, says: "There must be some present ground to apprehend that the title will be disputed and the means of sustaining it unavailing to the purchaser."

A similar question was raised in *Gibson v. Brown*, (Ill.) 73 N. E. 578, in which it was said that while a court of equity will never force upon a vendee a doubtful title, immaterial defects and technical objections, where a purchaser gets substantially what he contracts for, will not be permitted to be set up to defeat a decree of specific performance.

Under the fifth assignment of error appellants contend that there could be no proper decree in this case against them for the balance due on the purchase money without filing a cross-bill to which the personal representative of Polly M. Stowers would be a necessary party.

It is true that an answer to a bill often asks that the answer be treated as a cross-bill, if the respondent wishes affirmative

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relief which would be antagonistic to the relief sought in the bill, with the right of complaint to respond thereto by answer; but whether a cross-bill be resorted to or not depends upon the attitude the complainant assumes.

James M. Stowers had sued to recover of appellants the amount due on the purchase money bonds he held, which were long past due, and the bill in this cause was filed by appellants making James M. Stowers and the heirs at law of Polly M. Stowers, naming them, parties defendant thereto, the prayer of the bill being "that they be required to produce before this court the title of said James M. Stowers and said Polly Stowers, or either of them, to said land, in order that the same may be seen and inspected by the court, and all questions concerning said title may be adjudicated so that if good your orators may have proper conveyances executed, and if not good that said contract be rescinded and the purchase money so paid by them be refunded by the said James M. Stowers for the loss of the land."

This was plainly a bill for specific performance of the contract, if the title which they sought to bring out proved to be good; and with the alternative prayer, that if it was not good, the contract be rescinded. The decree in the cause, which is the result of the pleadings and proof demonstrates the fact that there was no need of the personal representative of Polly M. Stowers to be made a party thereto, as the decree simply carried out the contract in requiring the appellants to pay the money directly to James M. Stowers, to whom they agreed by their contract to pay it.

Under the sixth assignment of error, complaint is made of the action of the court below in requiring appellants to accept the deed executed by its commissioner on behalf of the infant defendants; and this assignment rests upon the theory that appellants after the death of Polly M. Stowers could not be compelled to accept the warranty of the heirs and especially to accept the commissioner's deed on behalf of the infants.

We are wholly unable to see any merit in this assignment.

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As we have seen, the court, after declaring that the contract of September 5, 1890, is valid and enforceable, notwithstanding the death of Mrs. Stowers, declares that any question of loss of the general warranty of the wife, if ordinarily sufficient to bar specific performances, was waived by appellants, who after her death recognized the contract as subsisting by retaining the possession of the lands and making payments thereon. This declaration is sustained by the facts already stated, and if necessary other equally cogent reasons for it might have been given, among them, that appellants desired and obtained possession of the lands "for prospecting for minerals or mining for same," and, having ascertained that the purposes for which they desired the lands had failed, without paying the purchase money, they retained possession of the lands down to the time of the institution of this suit, and to the present day; and the lands, profitable to James M. Stowers for farming purposes when he surrendered the possession thereof, and long prior thereto, have become greatly deteriorated, if not entirely worthless for those purposes. James M. Stowers was asked why he and his wife did not convey the lands to complainants before his wife's death, to which he made reply, "Because we had not received our money; we were ready to do it." The money was due, as we have already said, when Mrs. Stowers died, and James Stowers further testified that he had made every exertion possible to collect it, except to sue upon the bonds; so that if the warranty of Mrs. Stowers was necessary or even desirable to appellants they have no one to blame for their failure to get it except themselves.

The seventh and last assignment of error refers again to the refusal of the court to rescind the contract, and we do not deem it necessary to discuss this question further than has already been done.

Upon the whole case we are of opinion that the decree of the Circuit Court should be affirmed.

Affirmed.

Statement.

Wytheville.

FRANK & SONS v. GUMP.

June 28, 1905.

1. JUDICIAL NOTICE—*Law of Another State—Common Law.*—The courts of this State will take judicial notice of the fact that Maryland embraces a part of the territory of the original English colonies of America, and, in the absence of evidence to the contrary, it will be presumed that the common law prevails there.
2. PLEADING—*Judgment Non-Obstante—Payment of Less Sum Than Due.*—Where the sole issue in a case is made by a general replication to a plea of accord and satisfaction setting up the discharge of a bond by the execution and delivery of two notes for the amount of the principal of the bond, and no other consideration, and there is a verdict for the defendant, in those jurisdictions where the common law prevails, judgment should be entered for the plaintiff *non obstante veredicto*.
3. CONFLICT OF LAWS—*Contracts—Discharge.*—Upon a bond executed and payable in Maryland the Maryland law prevails as to what will constitute a discharge of the bond, though enforcement be sought in the courts of this State.

Error to a judgment of the Corporation Court of the city of Bristol in an action of debt. Judgment for the defendant. Plaintiffs assign error.

Reversed.

The opinion states the case.

Roberts & Roberts and *J. Kemp Bartlett*, for the plaintiffs in error.

Peters & Lavinder, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

Opinion.

This case is brought here by a writ of error and supersedeas to a judgment of the Corporation Court of the city of Bristol, rendered in behalf of the defendant in error, who was the defendant in the court below, in an action of debt.

The action is founded upon a bond executed by the defendant at the city of Baltimore, in the State of Maryland, and made payable to the plaintiffs in that city. The declaration alleges that the bond is a Maryland contract, and governed by the common law of that State.

The defendant filed a plea of accord and satisfaction in which he avers the making and delivery by him of two promissory notes to the plaintiffs, amounting in the aggregate to the *principal sum* of the original bond, which notes, it is said, the plaintiffs then and there accepted and received in full satisfaction and discharge of the bond described in the declaration.

The plaintiffs replied generally to that plea, and proved that by the law of Maryland, where the common law on that subject prevails, the acceptance by the creditor of the debtor's unsecured notes for a less sum does not operate to extinguish the original cause of action, or release the original debt.

There was a verdict for the defendant, and thereupon the plaintiffs moved the court for judgment *non obstante veredicto*, which motion the court overruled and rendered judgment for the defendant.

With respect to the doctrine invoked, professor Minor observes: "A motion for a judgment *non obstante veredicto*, that is, that judgment be given in the mover's favor, *without regard to the verdict* obtained by his adversary, is made in cases where, after a pleading by the adversary in *confession and avoidance*, and issue joined thereon, and verdict for the adversary, the unsuccessful party, in retrospective examination of the record, conceives that such pleading was *bad in substance*, and might have been made the subject of demurrer on that ground. . . . In such a case, therefore, the court will give judgment for such opposite party, *without regard* to the verdict." 4 Min. Inst. (3 Ed.), Pt. 1, p. 946.

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“The plea must show some consideration moving toward plaintiff, or, in other words, that plaintiff obtained something of value by the new agreement. A plea which on its face shows want of consideration is bad after verdict, and plaintiff is entitled to judgment *non obstante veredicto*.” 1 Cyc., p. 343.

The courts will take judicial notice of the fact that Maryland embraces a part of the territory of the original English Colonies of America, and, in the absence of evidence to the contrary, it will be presumed that the common law obtains there. *Nelson v. C. & O. Ry. Co.*, 88 Va. 976, 14 S. E. 838, 15 L. R. A. 583; *Stewart v. Conrad*, 100 Va. 128, 40 S. E. 624; *Bowers v. Bristol Gas Co.*, 100 Va. 533, 42 S. E. 296.

But, as remarked, the plaintiffs proved affirmatively that by the law of Maryland the new notes did not operate as an accord and satisfaction of the original debt.

For these reasons, the trial court erred in overruling the motion of the plaintiffs for judgment without regard to the verdict, and for that error its judgment must be reversed, and judgment rendered here for the plaintiffs in error.

Reversed.

Opinion.

Wytheville.

KANE V. QUILLIN AND OTHERS.

June 28, 1905.

1. **FRAUD--*Undue Influence--Case in Judgment.***—The deed of trust and rental contract sought to be vacated in this suit were obtained from the maker, a widow woman living in the county, by the beneficiary in said deed and contract, under circumstances which created upon her mind the impression that such beneficiary had it in his power to sell her property for the satisfaction of his demands, the principal part of which was barred by the statute of limitations, and that the only mode of postponing this disaster was by executing the deed and contract, and so amounted to undue influence on account of which the same should be set aside.

Appeal from a decree of the Circuit Court of Scott county in a suit in chancery. Decree for the complainant. Defendant appeals.

Affirmed.

The opinion states the case.

Bullitt & Kelly and *Roberts & Roberts*, for the appellant.

Jackson & Coleman, for the appellees.

KEITH, P., delivered the opinion of the court.

William B. Quillin purchased a lot of ground in Gate city in 1874 from H. W. Holdway, and in 1887 caused a deed for it to be made to his wife, as her separate estate. Shortly there-

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after Edmonds, a judgment creditor, filed a bill in Scott county, to subject this lot to the payment of judgments against him, alleging that the purchase price had been paid by Quillin, and that the deed to his wife was in fraud of his rights. A decree was entered maintaining the claims of the creditor, but an arrangement was made by which the debts were otherwise provided for, and the property was not sold.

After Edmonds had obtained a decree for sale, H. S. Kane, also a judgment creditor of Quillin, filed his petition in that suit, but no action was taken upon it, and the suit was afterwards dropped from the docket with the assent of Kane, who also expected to be paid the amount due him from another source.

In 1899 Quillin died, and in February, 1901, H. S. Kane procured a deed of trust from Mrs. Quillin, by which she conveyed the lot in Gate city to R. F. McConnell, as trustee, to secure two judgments which Kane had obtained against her husband in his lifetime.

In May, 1901, Mrs. Quillin filed her bill in chancery against Kane and R. F. McConnell, trustee, in which she states the circumstances connected with the deed executed by her in February, 1901. Her account of the transaction is that Kane, in company with G. W. Mann, a justice of the peace, came to her house and informed her that he had a judgment and could sell her house and lot to satisfy the same, but that he did not desire to put her to any costs, and that he had come to see her to get her to rent the house to satisfy his judgment as well as other debts he had against her late husband; that he read a paper to her, which he said was an agreement to that effect, and requested her to sign it, which she did; and that he then read to her another paper which she has since learned was a trust deed, securing the payment to Kane of a large sum of money, and she avers that she was so overcome at the time, believing the statements made by Kane were true, that her home was about to be sold from her, that she did not fully

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comprehend the facts, nor realize the results of her acts, and in her excitement she was induced to sign the two papers; that she believed from the statements made by Kane that he did have judgments against her husband, by force of which he could and would sell her house and lot, and that, acting upon this belief, and in order to save her home from sale, she signed the trust deed and other writing in question. She then charges that the statements made by Kane were false, and that he knew them to be false when he made them; that he had no judgment or any other debt against her husband to satisfy for which he could sell her property, or which was a lien upon it; that it was true that in the year 1892 he had obtained a judgment against her husband for \$24.60, and that he had recovered against her husband another judgment long before that time, both of which were at the time she executed the deed barred by the statute of limitations.

Kane answered this bill, denying all fraud and misrepresentation. He says that he explained to the complainant the whole transaction; that a suit was instituted by Edmonds against Quillin, herself and others in 1887, in which the deed from Holdway to her was declared void as to the debts of Edmonds and others, and that respondent had filed his petition in said suit for the purpose of having his judgment for \$152.27 paid out of the house and lot, and could have had the same subjected but for an arrangement he had made, by which he expected to receive the money due him. He alleges that complainant signed the deed of trust and rental agreement after full explanation, and without undue influence, and he denies that the judgments, or either of them, are barred by the statute of limitations, or that they have been in any way paid or satisfied.

Mrs. Quillin's deposition was taken, in which she reiterates and amplifies all the facts charged in her bill. The deposition of Kane, the defendant, was also taken. He admits that he went to the house of the plaintiff in company with a justice

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of the peace, with an agreement providing for the rental of the property and the payment of the rent to him, and with the deed of trust ready to be executed; and to that extent his testimony is not in conflict with that of complainant.

G. W. Mann, the justice of the peace, also testified. He describes the visit made by him in company with Mr. Kane to the house of Mrs. Quillin, and states that the interview between them seemed to be friendly and pleasant; that he observed no unusual excitement upon the part of the plaintiff; and that Mr. Kane explained to her the origin of the debt, the moral obligation which, from his point of view, rested upon her to pay it; requested her to sign the trust deed which had been prepared, and suggested that she pay the debt out of the rent of the property at Gate City, and thereby save the sale of the property under the trust deed, and to this she agreed, and signed the papers which were offered to her for signature. This witness was asked at the close of his examination: "Did Mr. Kane tell Mrs. Quillin that he could enforce his judgments against the house and lot which was conveyed by the trust deed, but he did not wish to put her to such costs and trouble, and would not do so if she would sign the trust deed, and that he thought it would be best for her to sign the trust deed? A. I don't think he said he could enforce them, but he told her that he thought he would come and see her before he took any steps to enforce them, and see if he could not adjust the matter agreeably. Q. Was or not the effect of his conversation calculated to lead Mrs. Quillin to believe that he could sell her house and lot for the satisfaction of his judgments, and that he would do so if she did not adjust the matter? A. The conversation had in connection with the papers would lead a person of ordinary prudence to so think."

Upon the evidence the Circuit Court was of opinion that the plaintiff was entitled to the relief prayed for in her bill, and decreed that the deed and contract in the pleadings mentioned be set aside and vacated, and the case is before us upon the appeal taken by H. S. Kane, one of the defendants.

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We consider the following facts proved by the evidence: H. S. Kane, in company with a justice of the peace, called upon Mrs. Quillin, a widow woman living in the country, taking with him copies of certain judgments which he had obtained against her husband, with a contract providing for the renting of her house and lot, and a deed of trust upon it to secure his debts, and accompanied by a justice of the peace, and by his representations and the exhibition of the copies of the judgments and papers, their effect doubtless strengthened by the presence of the justice of the peace, whether intentionally or not, created upon her mind the impression that he had it in his power to sell her property for the satisfaction of his demands, and that the only mode of postponing this disaster was by signing the rental agreement, which placed the rents of the house and lot at his disposition, and the deed of trust as ultimate security for the satisfaction of the judgments. It further appears that the principal judgment having been obtained more than ten years prior to the death of Quillin, the judgment debtor, and no execution having been issued upon it, was barred by the statute of limitations. Without considering whether or not the judgment for \$24.60, obtained in 1892, was or was not barred at the date of the execution of the deed of trust, we are of opinion that appellant obtained the deed of trust and the rental contract from Mrs. Quillin by the exercise of undue influence, and that there is no error in the decree of the Circuit Court, which is affirmed.

We are opinion, however, that the affirmance should be without prejudice to the right of the appellant to subject the house and lot in Gate City to the payment of the last mentioned judgment, provided he is able to aver and prove actual fraud on the part of W. B. Quillin and his wife, Martha Quillin, in the deed of Holdway and wife, executed in 1887.

Affirmed.

Syllabus.

Staunton.

SOUTH & WESTERN RAILWAY CO. v. COMMONWEALTH.

September 14, 1905.

1. **APPEAL AND ERROR**—*Points not made in Trial Court—Jurisdiction of Trial Court.*—Generally a question not made in the trial court cannot be raised in the appellate court, but this rule has no application where the question involves the jurisdiction of the trial court of the subject matter of litigation. Consent cannot give jurisdiction of the subject matter of litigation, and the lack of such jurisdiction may be taken notice of by the appellate court of its own motion.
2. **QUO WARRANTO**—*Railroads—Forfeiture of Charter—Who May Be Relator*—A writ of *quo warranto* does not lie at the relation of a private person to determine whether or not a railroad company has forfeited its charter for failure to construct a certain part of its road within the time prescribed by its charter. The State alone can institute such a proceeding. While the language of the statutes applicable to *quo warranto* is broad enough to cover such a case, the case is otherwise specially provided for by Code (1904), Sec. 1313a, Cl. 58, which is to be treated as an exception to the general provisions.
3. **STATUTES**—*Code of 1887—Discrepancies—Construction.*—The Code (1887) is one act, and is to be construed as a whole, and apparent discrepancies and disagreements are to be so interpreted as that all, if possible, may stand together.
4. **STATUTES**—*Special Followed by General—Construction—Repeals.*—Where there are two statutes, the earlier special and the latter general, but containing terms broad enough to cover the subject matter of the special, the presumption is that the special is to be considered as remaining an exception to the general, and the general will not repeal the special unless its provisions are manifestly inconsistent with those of the special. This is particularly so where the general and special provisions are parts of the same act or code of laws.

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Error to a judgment of the Corporation Court of the city of Bristol in a proceeding by *quo warranto* in the name of the Commonwealth at the relation of C. B. Flanary and others against South & Western Railway Company. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Archer A. Phlegar, J. Norment Powell and R. T. Irvine, for the plaintiff in error.

D. D. Hull, Jr., W. S. Cox, Hoge & Bailey, Bailey & Byars, Bullitt & Kelly and Frank W. Christian, for the defendants in error.

BUCHANAN, J., delivered the opinion of the court.

This is a writ of error to a judgment of the Corporation Court of the city of Bristol in a *quo warranto* proceeding, by which it was determined that the plaintiff in error had forfeited all its rights, privileges, and franchises as a corporation in this State, because it had failed to construct and have in operation thirty miles of its road in this State within the time required by its charter.

The first assignment of error to be considered, and the only one that can be considered if it is sustained, is that the trial court had no authority to issue the writ of *quo warranto* upon the petition of private persons. This question was not raised in the court below, and it is insisted by the relators that it cannot be made in this court for the first time.

The general rule is that a question not made in the trial cannot be raised in the appellate court. This rule, however, is subject to exceptions, one of which is, that a question which goes to the jurisdiction of the court may not only be raised for the first time in the appellate court, but where it appears that the trial court did not have jurisdiction the appellate court may of its own motion take notice of that fact.

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As was said by President Tucker in *Jones & Ford v. Anderson*, 7 Leigh 308, 314, "It must always be *ex officio* the duty of a court to disclaim a jurisdiction which it is not entitled to exercise. To do otherwise would be to usurp a power not conferred by law."

To hold that the question of the jurisdiction of the trial court could not be made in the appellate court for the first time would be in effect to hold that consent could give jurisdiction, and might result in the affirmance of a judgment which the trial court had no authority to enter. See *Phillips v. Com'th*, 19 Gratt. 485; *Ryan v. Com'th*. 80 Va. 385; *Saunders v. Grigg*, 81 Va. 506; *McAllister v. Guggenheimer*, 91 Va. 317, 320, 21 S. E. 475; *Boston Blower Co. v. Carmen Lumber Co.*, 94 Va. 94, 100, 26 S. E. 390.

The ground upon which it is claimed that the trial court did not have jurisdiction is that the general law which authorizes a writ of *quo warranto* to be awarded against corporations generally (other than municipal corporations,) upon the petition of private persons, does not apply to a railroad or other internal improvement company for failure to complete its works within the time prescribed by its charter, because such a case is provided for by a special statute in which the State alone is authorized to institute a *quo warranto* proceeding. It is conceded that the provisions of the general law are sufficiently broad to embrace a railroad corporation, but the contention is that where the special provision is in conflict with the general law the special provision to the extent of such conflict will govern.

That special provision is as follows: "If the works of any internal improvement company be not commenced and be completed within the time prescribed by law, or by its charter, or if after such works be completed, the company abandon them, or for three successive years cease to use and fail to keep them in good repair, in each of these cases the State may proceed against such company by writ of *quo warranto*, and if, in any such proceeding, there is a judgment against the company, the commis-

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sion shall forthwith take possession of its works and property and sell the same (except the debts owing to the company,) and convey the works and property so sold to the purchaser thereof as soon as the purchase money has been paid; the deed of conveyance to be executed by the chairman of the commission under its seal. The commission shall, moreover, collect, as far as practicable, the debts aforesaid, and apply the proceeds thereof and of the said sale, after deducting the costs and expenses of the collection and sale, to the discharge of the liabilities of the company, and whatever remains after said liabilities are discharged, pay into the treasury of the State. Upon such conveyance to the said purchaser, he shall forthwith be a corporation by any name which may be set forth in such conveyance, or any writing signed by him and admitted to record in the county or corporation wherein the conveyance shall be admitted to record; and to the corporation thus created all the provisions of section 1234 of the Code shall apply except that the franchises, rights, and privileges to which such corporation shall succeed, and the duties which it shall perform, shall be such as would have been had or performed by the first company but for the judgment aforesaid in the proceeding by writ of *quo warranto*, or information in the nature of a writ of *quo warranto*, save only as in said section provided." Va. Code, 1904, sec. 1313a, cl. 58.

The general statutes, which it is claimed contain provisions in conflict with that special provision, are as follows:

Va. Code, 1904, sec. 3022. *In what cases writ of quo warranto awarded.* A writ of *quo warranto* may be awarded and prosecuted in the name of the State of Virginia, in any of the following cases, to-wit:

First, against a corporation (other than a municipal corporation) for a misuse or non-use of its corporate privileges and franchises, or for the exercise of a privilege or franchise not conferred upon it by law, or where a charter of incorporation has been obtained by it from a court for a fraudulent purpose, or for a purpose not authorized by law;

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Second, against a person for the misuse or a nonuse of any privilege and franchise conferred upon him by or in pursuance of law;

Third, against any person or persons acting as a corporation (other than a municipal corporation) without authority of law; and

Fourth, against any person who shall intrude into or usurp any public office. But no such writ shall be awarded or prosecuted against any person now in office for any cause which would have been available in support of a proceeding to contest the election of such person to such office."

"Sec. 3023. *When, where, how, and by whom the writ to be applied for.* Whenever the attorney-general or attorney for the Commonwealth of any county or corporation, the Circuit or Corporation Court whereof has jurisdiction of the proceeding, is satisfied that a cause for the writ exists, he may, at his own instance, or at the relation of any person interested, apply by petition to the said Circuit or Corporation Court, or to the judge thereof in vacation, to have such writ issued, and shall state the reasons therefor in the petition. If the Attorney-General, or the attorney for the Commonwealth, upon being requested as aforesaid, refuse or fail to apply for the writ, the person so interested may present his petition to such court or judge asking for the same."

"Sec. 3024. *When awarded; where returnable; how signed and attested; when bond required.* If, in the opinion of the court or judge, the reasons so stated in the petition are sufficient in law, the said writ shall be awarded by the court or judge, returnable to the next term of the court, and the same shall be signed by the judge and attested by the clerk of such court. But if the writ be awarded at the relation of any person, it shall not be issued until the relator shall have given bond with sufficient surety (if such bond be required by the court or judge), to be approved by the clerk, in such penalty as the

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court or judge shall prescribe, with condition that the relator shall pay all such costs and expenses as may be incurred by the State in the prosecution of the writ, in case the same shall not be recovered from and paid by the defendant therein."

Sec. 1105e, cl. 30. "All corporations, whether they expire by their own limitation or are otherwise dissolved, shall, nevertheless, be continued for such length of time as may be necessary from such dissolution or expiration for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital, but not for the purpose of continuing the business for which said corporation shall have been established."

A comparison of these statutes will show that section 3022 is a general provision broad enough to embrace all corporations (other than municipal corporations), while clause 58, sec. 1313a is a special provision applicable only to internal improvement companies; that by section 3023 a *quo warranto* proceeding may be instituted in the name of the Commonwealth against a corporation, for a nonuse or misuse of its corporate franchises, not only by the Attorney-General or the attorney for the Commonwealth for the proper county, but also by private persons under certain conditions, while by clause 58, sec. 1313a, the State alone is authorized to institute a *quo warranto* proceeding against an internal improvement company for its failure to commence and to complete its works within the time prescribed by its charter; and that clause 30 of sec. 1105e, construed in the light of clause 1 of that section, provides that all corporations, whether they expire by their own limitation or are otherwise dissolved (and one of the methods of dissolving a corporation is by a forfeiture of its franchise by a judicial proceeding), shall nevertheless be continued for such length of time as may be necessary from such dissolution or expiration for the purpose of prosecuting and defending suits by or against them, to enable them gradually to settle and close their business,

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to dispose of and convey their property and to divide their capital, but not to continue the business for which they were incorporated; while by clause 58, sec. 1313a, if there be a judgment in a *quo warranto* proceeding against an internal improvement company, the State Corporation Commission is required forthwith to take possession of the works and property of such company, sell the same (except debts due to it), convey its works and property to the purchaser as soon as the purchase money has been paid, collect its debts and apply the proceeds thereof and of the sale of its works and property, after deducting costs and expenses of such collection and sale, to the discharge of the liabilities of the company, and pay the residue into the treasury of the State, and, upon a conveyance of the works and property so sold, the purchaser is created a corporation, and the new corporation thus created succeeds to all the franchises, rights, and privileges, and is required to perform all the duties that would have been had or should have been performed by the old company, except as provided by section 1234 of the Code of 1887 (clause 13 sec. 1294b, Code of 1904).

These general and special provisions are in apparent conflict. The parties authorized to institute the proceedings are different. Under the special provisions it can only be done by the State, while under the general provisions it may, under certain circumstances, be instituted by private persons. The consequences which flow from a judicial forfeiture of a corporation's franchises under the general and special provisions are wholly different. In the one case the corporation for some purposes continues to exist, it settles and closes its business, sells and conveys its property, collects its debts and divides its capital. In the other the corporation ceases to exist for any purpose. An agency of the State government winds up its affairs, and the proceeds of its works, property and the debts due it, after the payment of the costs and expenses attending their sale and collection, and the payment of the company's lia-

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bilities, are paid into the treasury of the State, and the purchaser of its works and property is created a new corporation, clothed with the powers and burdened with the duties of the old corporation.

The history of the general and special provisions, so far as is material to the question now under consideration, is as follows: Sections 3022, 3023, and 3024, became the law by the Code of 1887, and they have not been amended or changed by subsequent legislation. Clause 30 of section 1105e, so far as its provisions affect this case, is substantially the same as section 1103 of the Code of 1887. Clause 58 of section 1313a, is the same as section 1239 of the Code of 1887, except that the latter provision conferred and imposed upon the Board of Public Works the powers and duties which clause 58 confers and imposes upon the State Corporation Commission.

The Code of 1887 is one act. Sec. 1, Code, 1887. It is a settled rule of construction that all statutes *in pari materia* should be read and construed together as if they formed parts of the same statute and were enacted at the same time, and where there is a discrepancy or disagreement between them such interpretation should be given as that all if possible may stand together. *Dillard v. Thornton*, 29 Gratt. 392, 396. In that case it is said that the rule applies with peculiar force in the construction of a Code to the several parts thereof which relate to the same subject matter, were conceived by the same minds, prepared by the same hands, and adopted at the same time by the same legislative body. *Easley v. Barksdale*, 75 Va. 281; *Bank v. Holland*, 99 Va. 495, 505, 39 S. E. 126, 86 Am. St. Rep. 898, 55 L. R. A. 155.

Another rule of construction is that where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that one is special and the other general creates a presumption that the special is to be considered as remaining an exception to the general, and that the general will

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not be considered as repealing the special unless the provisions of the general are manifestly inconsistent with those of the special. Sedgwick on Constr. of Stat., &c., p. 97 and note; Sutherland on Constr. Stat. ss. 152, 153; 26 Am. & Eng. Ency. of L. (2 Ed.), 739-40; *Com'th. v. R. & P. R. R. Co.*, 81 Va. 355, 367-8. And *a fortiori* this must be the true rule where the general and special provisions are parts of the same act or Code of laws.

These rules of construction were followed in the case of *Dillard v. Thornton*, *supra*, where two sections of the Code of 1849, were in apparent conflict. "These sections of the Code," said the court in that case, "in the points of apparent disagreement, are now substantially as they came from the hands of the revisors, and the only way to give effect to section 6 of chapter 166, is to construe it as in the nature of a proviso to section 45 of chapter 167. The latter section gives the general rule, the former the limitation, or exception."

The only way to give effect to clause 58 of section 1313a is to construe it as a limitation upon, or an exception to, the general provisions contained in sections 3022, 3023, 3024, and clause 30 of section 1105e, as was done in *Dillard v. Thornton*. Under this construction, which we deem the correct one, it follows that the Corporation Court did not have jurisdiction to award the writ of *quo warranto* against the plaintiff in error upon the petition of private persons, as were the relators.

Its judgment must, therefore, be reversed, and the petition of the relators be dismissed.

Reversed.

Statement.

Staunton.

SOUTH & WESTERN RAILWAY CO. v. VIRGINIA AND SOUTHWEST-
ERN RAILWAY COMPANY.

September 14, 1905.

1. **INJUNCTION—Irreparable Injury—How Charged.**—An injunction to prevent an irreparable injury will not be awarded upon a bill which merely sets out the pleader's conclusions. The bill must show how the irreparable injury apprehended is to arise, by giving a full and detailed statement of the facts and circumstances and the nature and condition of his property so as to enable the court to determine the necessity for the injunction.
2. **INJUNCTION—Threatened Cloud on Title—Inadequacy of Remedy at Law.**—A bill to enjoin the imposition of an alleged cloud on complainant's title, and not the removal of an existing cloud, must show affirmatively, not only the cloud or the threatened acts which will impose it, but also the inadequacy of the remedy at law, for if the remedy at law is adequate, a court of equity will not interfere.
3. **INJUNCTION—Condemnation of Railroad—Adequacy of Remedy at Law.**—Injunction will not lie to prevent one railroad company from instituting proceedings to condemn a part of the right of way of another railroad company as the remedy of the latter company in the condemnation proceedings is full, adequate and complete.
4. **EMINENT DOMAIN—Railroads—Consent of State Corporation Commission—Injunction—Insufficient Charges of Bill.**—The failure of a railroad company to obtain the consent of the State Corporation Commission to condemn the lands of another railroad company, as required by Sec. 1105e, cl. 52, Code 1904, before entering thereon to make surveys preparatory to the institution of condemnation proceedings, cannot be relied on in support of an injunction granted on other grounds, where no such failure is charged in the bill.

Appeal from a decree in chancery of the Circuit Court of Scott county. Decree in favor of defendant. Complainant appeals.

Affirmed.

Opinion.

The opinion states the case.

Archer A. Phlegar, R. T. Irvine and J. Norment Powell,
for the appellant.

D. D. Hull, Jr., and Bullitt & Kelly, for the appellee.

WHITTLE, J., delivered the opinion of the court.

This appeal is from a decree dissolving an injunction and dismissing the plaintiff's bill, on demurrer, with costs.

The material allegations of the bill are that the plaintiff is a public service corporation, duly organized and existing under the laws of the State of Virginia, and holds the legal title to, and has possession of, a right of way consisting of a strip of land 66 feet in width, extending from a point near Clinchport, in Scott county, to a point near St. Paul, in Wise county, Virginia. Upon that right of way a road-bed has been located and graded, and is practically in condition for the laying down of ties and steel, and that plaintiff is proceeding to construct and maintain a railroad thereon as authorized by law; that the defendant, claiming to be a public service corporation, and its agents, had entered and are entering upon said strip of land at various points, and had commenced the making of surveys, and the location of a line of railroad upon the same, and had committed and is committing innumerable trespasses in and upon said strip of land; that the acts aforesaid had been undertaken and are being carried on by the defendant as the basis of condemnation proceedings to be instituted by it against said strip of land; that the plaintiff is a public service corporation possessing the powers of eminent domain, and, therefore, no surveys or locations can be made upon its property, and that any entry upon its property for that purpose is a trespass; that the defendant commenced the surveys and locations complained of within the last day or two, and is prosecuting the

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same with two or more corps of engineers, and unless restrained (without the court requiring notice of the application for injunction) will complete the surveys and locations, and institute condemnation proceedings, which, if commenced, will constitute a cloud upon the title of the plaintiff, and inflict irreparable damage upon it; that the acts of the defendant in reference to said land are not being done in good faith for the purpose of building and operating a railroad, but are being done for the sole purpose of hindering and delaying the plaintiff in the construction of its line of road; that the defendant is not a corporation duly organized under the laws of the State of Virginia, and cannot exercise the powers of a public service corporation.

The prayer of the bill is that the defendant and its agents be enjoined and restrained from entering upon the plaintiff's property and from making or attempting to make surveys and locations for a railroad thereon, and from doing any act with reference thereto, and especially from instituting and prosecuting condemnation proceedings against said strip of land.

It is quite apparent that the feature of the bill which deals with the alleged invasion of the plaintiff's premises by the defendant, for the purpose of surveying and locating the route for a railroad along its right of way does not present a case for injunctive relief on the theory that irreparable damage will result from the acts complained of. The rule in such case is that, in invoking this extraordinary remedy, the facts and circumstances constituting the alleged grievance must be specifically set out in the bill for the court to determine whether, in a legal sense, the mischief is irreparable.

The principle is thus stated in the *Encyclopaedia of Pleading and Practice*: "A general allegation that the acts apprehended will be irreparable, unattended by such a statement of facts as will enable the court to see that such will be the result, is insufficient. The pleader must not content himself with a mere averment of his conclusions, but must show how the irreparable

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injury apprehended is to arise, by giving a full and detailed statement of the facts and circumstances, the nature and condition of his property, etc., so as to enable the court to determine the necessity for an injunction." 10 *Ency. of Pl. & Pr.*, 954; *Collins v. Sutton*, 94 Va. 127, 26 S. E. 415.

In this instance the bill does not charge physical injury or damage to the substance of the plaintiff's property, nor any physical obstruction or interference by the defendant in the prosecution of the work. Consequently these preliminary acts cannot *per se* inflict irreparable damage, and are but means to an end, which constitutes the *gravamen* of the complaint—namely, that the defendant intends to institute condemnation proceedings against a part of the plaintiff's right of way; which, it is said, will impose a cloud on the title to the property from which irreparable damage will result. So that, in its last analysis, the question presented by the bill for decision is, whether a court of equity ought, upon the case made, to enjoin the defendant from instituting and prosecuting the contemplated condemnation proceedings, and that depends upon whether such proceedings afford a plain, adequate, and complete remedy for the wrongs sought to be redressed.

The well established jurisdiction of courts of equity to remove clouds from the title of the true owner of property by cancelling an outstanding claim or encumbrance, which, if valid and subsisting, would affect or impair the title has no application to the facts of this case. The proceeding is really one to prevent the imposition of an alleged cloud upon plaintiff's title, rather than to remove an existing cloud. In that class of cases, the rule is that the bill must show affirmatively the cloud, or the threatened acts which will impose it, and also the inadequacy of the remedy at law. For where the remedy at law is adequate, a court of equity will not interfere. 17 *Ency. Pl. & Pr.*, 343; *Otey v. Stuart*, 91 Va. 714, 716, 22 S. E. 513; *Va. Coal & I. Co. v. Kelly*, 93 Va. 332, 339, 24 S. E. 1020; *Sulphur Mines Co. v. Boswell*, 94 Va. 480, 484, 27 S. E. 24.

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In condemnation proceedings, the rights of the owner of property sought to be condemned are amply safe-guarded by statute.

With respect to procedure, it is said:

"Although the tribunal which hears and determines the questions in condemnation proceedings has a special jurisdiction, and the proceedings are summary in their nature, yet the conduct of the proceedings is governed by the ordinary rules of law which obtain in the trial of civil cases, with such modifications as are required by the peculiar nature of the questions to be determined. The hearing should be commenced at the time designated in the notice; and if tried on a wrong theory it is reversible error. The right to institute condemnation proceedings may properly be determined on a motion to dismiss the same.

"As to the province of the court and jury, respectively, in condemnation proceedings, the ordinary rule in civil cases applies, questions of law being for the court, and those of fact for the jury or commissioners. It is for the court to determine the preliminary question of the right to condemn the land, or whether the use is a public one, while it is for the jury to determine the measure of compensation, or whether the use is temporary or permanent; and all questions of value and benefit." 15 Cyc. 863, *et seq.*

In *Chesapeake, etc., R. Co. v. Washington, etc., R. Co.*, 99 Va. 715, 40 S. E. 20, this court says: "It is not denied that, under some circumstances, unless expressly prohibited, one railroad company may condemn the land of another for its purposes, but it is denied that such circumstances existed in this case. It may be that this is true, but that was one of the questions involved in the condemnation proceedings." Again, at page 723: "The statute does not specifically provide what issues may be raised upon the motion to condemn, but it is unreasonable to say that the defendant must be notified when the motion to condemn his land will be made, and yet when he ap-

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pears he cannot be heard to show that the plaintiff has no corporate existence, or that it has no authority to condemn the particular property for its use, or that it can only condemn upon certain conditions which have not been complied with, or under circumstances which do not exist. The policy of the law is to have all matters arising out of one controversy settled in a single suit, and this ought to be so, especially in a proceeding the effect of which is to take the defendant's land against his will and invest the plaintiff with the fee-simple title to it. If this be not the case, railroad companies would have no assurance that the steps taken by them to procure rights of way or property wanted for their purposes would conclude any one, and they would be constantly subject to vexatious litigation. This view is not only in accordance with the better reason, but is sustained by the weight of authority. See 2 Mills on Em. Dom. (2nd Ed.), secs. 388, 389, 391; *B. & O. R. Co. v. P. W. & Ky. R. Co.*, 17 W. Va. 844; *St. Joseph R. Co. v. Hannibal, etc., R. Co.* (Mo.), 6 S. W. 691; *Secombe v. R. Co.*, 23 Wall. 109, 119, 23 L. Ed. 67; 1 Red. on Railways (5th Ed.), 271."

It is obvious that every question raised by the bill touching the right of the defendant to condemn any part of the land in controversy can be determined in the condemnation proceedings; and the plaintiff having an adequate remedy at law, it follows, upon the principles adverted to, that a bill for injunction does not lie. Lewis on Em. Dom. (2nd Ed.), s. 646; 15 Cyc. 987; High on Injunctions, ss. 644, 645; 1 Beach on Injunctions, s. 581; *Waterloo Water Co. v. Hoxie* (Iowa), 56 N. W. 499.

The exceptions and qualifications to the rule, which find expression in the opinions of courts and text-writers, leave unimpaired the established general doctrine, prevailing in this jurisdiction, that courts of equity will not interpose by injunction where there is a plain, adequate, and complete remedy at law.

It was sought to bring the case within the influence of that line of authorities which hold that an injunction will lie to

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prevent entry on property, or the construction of works, before complying with the law, or without authority of law, by insisting that the defendant had not obtained previous permission from the State Corporation Commission to condemn the property, as required by sec. 1105e, cl. 52 of Va. Code, 1904. But a non-compliance with that section is not charged in the bill, and the effect of the provision cannot, therefore, be considered.

There is no error in the decree appealed from, and it is affirmed.

Affirmed.

Syllabus.

Staunton.

SCOTT V. THOMAS & OTHERS.

September 14, 1905.

1. **EVIDENCE—Consideration of Deed—Varying Written Instrument.**—Although a deed of trust to secure a note for \$2,200 recites the consideration as the satisfaction of certain liens, and the payment of certain specific debts, the true consideration of the deed may be shown by parol, and the deed, in the absence of any fraudulent intent on the part of the parties thereto, will be held as a valid security therefor. Such evidence does not tend to vary or contradict the deed.
2. **NOTARY PUBLIC—Agent or Servant of Grantee—Competency.**—The fact that the notary who takes the acknowledgment of the grantors in a deed is the clerk, agent, and employee of the trustee in the deed, and receives a salary for his services as such, does not affect his competency to take such acknowledgment and receive compensation therefor.
3. **EQUITY—Bill by Judgment Creditor Assailing Deed for Fraud—Failure of Proof—Retaining Cause.**—Upon a bill filed by a judgment creditor seeking to set aside as fraudulent a deed of trust given by the judgment debtor on his real estate, and to subject the land to the lien of his judgment, where there is a failure to establish the fraud charged, the bill should not be dismissed, but (the trust debt being due at the hearing) should be retained on the docket, and the creditor permitted to have the land sold, and to subject the excess, if any, over the deed of trust debt to the payment of his judgment. It is immaterial that the trust debt was not due at the time the creditor filed his bill.
4. **EQUITY—Bill by Judgment Creditor—Fraudulent Deed—Complete Relief.**—A judgment creditor already properly before the court to have set aside as fraudulent a deed made by the judgment debtor, will not be turned out of court and sent to another suit to prove his debt, upon failure to establish the fraud charged, but will be given complete relief in the suit brought by him.

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Appeal from a decree in chancery of the Circuit Court of Floyd county. Decree in favor of defendants. Complainant appeals.

Reversed in part.

The opinion states the case.

Robert E. Scott, and G. M. Agnew, for the appellant.

Archer A. Phlegar, Tompkins & Tompkins, M. S. Howard, and V. M. Sowder, for the appellees.

KEITH, P., delivered the opinion of the court.

On the 26th day of October, 1901, Thomas and wife, conveyed certain land by deed to Brame, trustee. The deed, omitting the description of the property conveyed, is in the following words:

"This deed, made and entered into this the 26th day of October, 1901, between I. O. D. Thomas, and Mary C. Thomas, his wife, of the first part, and S. R. Brame, trustee, of the second part.

"Witnesseth: (That for and in consideration of the Peoples Bank of Floyd, satisfying the lien debts against the said I. O. D. Thomas and the debts in the Peoples Bank now due and protested against the said I. O. D. Thomas,) the parties of the first part grant, sell and convey unto the said S. R. Brame, trustee, his real estate lying in the county of Floyd. . . . This deed is made in trust to secure the payment of one negotiable note for the sum of twenty-two hundred dollars (\$2,200), payable to the Peoples Bank of Floyd county, said note dated on the 26th day of October, 1901, and payable at Peoples Bank of Floyd county, four months after date of said note, said note made by the said I. O. D. Thomas. And this deed is given to secure each renewal of said note or part thereof that may be made by the said Thomas and accepted by the said bank."

This deed was, on the 28th day of October, 1901, at ten

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minutes past ten o'clock, A. M., duly admitted to record in the clerk's office of the County Court of Floyd county. On the same day, at twenty minutes past twelve o'clock, P. M., Thomas confessed a judgment in favor of W. Scott for the sum of \$734.93. On the 28th day of October, 1901, "in consideration of the sum of \$475," paid by S. R. Brame on the debts of Thomas, Thomas sold to Brame certain personal property, horses, cattle, sheep, and a wagon, the bill of sale for which was recorded on the same day in the clerk's office of Floyd county. It appears also that an execution, dated the 28th day of October, 1901, upon the judgment confessed by Thomas to Scott, was levied on the 29th day of October upon the property sold by Thomas to Brame, the bill of sale for which has just been adverted to. The levy of this execution was released by order of the plaintiff on November 14, 1901.

On November 15, 1901, Scott instituted a suit in equity against Thomas, Brame, as trustee, and in his own right, and the Peoples Bank of Floyd. In his bill he insists that the deed of trust from Thomas to Brame was made with intent to defraud his creditors, and that it undertook to secure a greater amount than was justly due by Thomas, and prays that it may be declared a lien only for the amount actually advanced by the People's Bank of Floyd to pay the lien debts of Thomas and such other debts due to the People's Bank as were due and protested at the date of the deed of trust, and that the bank be compelled to apply the proceeds of the two notes given to Thomas by Ira M. Compton and in the possession of the bank, amounting to \$265, to the lien debts which it holds against Thomas. The bill further sets out the sale of the personal property by Thomas to Brame, avers that at the institution of this suit no part of the consideration had been paid, and claims that the whole of it should be applied to the satisfaction of Scott's judgment against Thomas.

By an amended bill it is charged that the deed of trust from Thomas to Brame was acknowledge before R. B. Morgan who was at the time the "clerk, agent, and employee of said S. R.

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Brame, trustee, was sent by said Brame, the grantee in said deed, with the same to said Thomas and his wife to procure their acknowledgements to the same, and for the services so rendered in addition to the regular salary paid by said Brame to said Morgan, said Morgan was agreed to be paid and was paid by the said Brame \$1.50 out of the money to be raised under said deed." These facts the plaintiff claims rendered Morgan incompetent to take the acknowledgements of Thomas and wife to the deed, and furnished no authority for the clerk to admit the same to record, and that its recordation is therefore of no effect.

The bank in its answer denies the fraud imputed to it, avers that it furnished valuable consideration for the full amount of the note of \$2,200 secured by said trust deed, except the sum of \$96.99 which is credited upon said note as of March 15, 1902, and further avers that the two notes executed by Compton to Thomas were purchased and fully paid for by it in May, 1901.

The answer of Thomas is substantially the same as that of the bank with reference to the note for \$2,200 and the Ira Compton notes. With reference to the personal property sold to Brame he avers that no part of the consideration of \$475. was ever paid to him, but that it was paid by Brame upon the respondent's debts.

Brame's answer is to the same effect.

Evidence was taken upon the issues thus made, and when the case was heard before the Circuit Court a decree was entered dismissing the bill, and W. Scott obtained an appeal to this court.

His contention is, first, that the Circuit Court erred in not holding the deed of trust to be fraudulent and void.

Without undertaking to review the evidence, we content ourselves with saying that the proof is insufficient to establish fraud. It, on the contrary, disproves any fraudulent intent upon the part of either the grantor, the grantee, or the beneficiary, and establishes the *bona fides* of the transaction.

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The second error assigned is that, in the event the deed is held not to the fraudulent, the decree of the Circuit Court is erroneous in not holding it to be a security only for the lien debts and the protested notes.

We think that the deed of trust is to be read as a whole. It is true that it purports to have been made in consideration of the Peoples Bank of Floyd satisfying the lien debts against Thomas and the debts in the Peoples Bank at that time due and protested against him; but the deed further declares that it was made in trust to secure the payment of a negotiable note for the sum of \$2,200, payable to the Peoples Bank of Floyd county, and the proof shows that the bank furnished a valuable consideration for the whole of this note, except the sum of \$96.99 which is credited upon it as of March 15, 1902. The proof does not tend to vary or contradict the deed. The usual form employed in deeds of trust is that the grantor, in consideration of a nominal sum, conveys property to the trustee to secure certain debts. If, instead of reciting that the deed was made in consideration of satisfying the lien debts and the protested notes, Thomas had conveyed to Brame in consideration of one dollar in hand paid, in trust to secure a note of \$2,200, it would have been a valid instrument; the real question being, upon the issue of fraud charged in the bill, whether there was a purpose in the execution of the instrument to hinder and delay the creditors of the grantor, or whether the amount secured was in good faith appropriated to the satisfaction of the grantor's creditors.

In *Lucas v. Claflin*, 76 Va. 269, this court held that to avoid a deed for fraud there must be a real design on the part of the debtor to prevent the application of his property in whole or in part to the satisfaction of his debts.

In this case there does not appear to have been any diversion of the debtor's property from his creditors, but the whole of it has been appropriated to the discharge of his debts. The proof also fails to make out the case stated in the bill with respect to the Compton note or notes.

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The decree of the Circuit Court is right with respect to the personal property purchased by Brame. The transaction is on its face a fair one. Brame purchased certain property from Thomas for the sum of \$475, to be paid to the creditors of his vendor. The proof shows that this obligation has been performed, and the appellant has failed to establish any fraud or bad faith with respect to the transaction.

We are further of opinion that the facts set out in the amended bill with reference to R. B. Morgan, the notary before whom the deed of trust was acknowledged are insufficient to affect his competency to take the acknowledgment of the deed.

The decree appealed from should not have dismissed the bill. The appellant had a lien by judgment. He sought to get rid of the deed of trust, either in whole or in part, upon his allegation of fraud. In that he has failed; but he was entitled to have the land sold and the proceeds applied first to the satisfaction of the deed of trust, and whatever might remain applied upon his judgment.

In answer to this contention appellees say, first, that at the time the bill was filed the debt secured by the deed was not due, which is true; but it was due when the decree dismissing the bill was entered. Appellees also claim that appellant could have gone into the chancery suits of *Howard's admr. v. Thomas*, and *Profit v. Thomas* and proved his judgment. To this we reply that he was already properly in court, and there was no reason for turning him out in order that he might assert his claim in another suit; and, in the second place, that there is no proof in the record of the pendency of any other suit to which he could have made himself a party. There is an exhibit in the record before us from which it appears that the chancery causes mentioned were "lately pending in the Circuit Court of Floyd county," which so far from showing that they were still upon the docket of the court in Floyd county rather indicates that they had been stricken from it.

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We are of opinion that the Circuit Court erred in dismissing the bill, and for this reason its decree must be reversed, and in all other respects affirmed.

Reversed in part.

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Staunton.

COMMONWEALTH, FOR ETC., v. WAMPLER & OTHERS.

September 14, 1905.

1. **ASSIGNMENTS—Incidents.**—The assignment of a judgment does not carry with it, as an incident, the right to sue the sheriff and the sureties on his official bond for a breach of the condition thereof occurring prior to the assignment by reason of his failure to return, in the time and manner required by law, a forthcoming bond taken upon such judgment. The right of action against the sheriff and his sureties for his failure to discharge an official duty does not constitute a security for the debt, though it may affect the value of the judgment.
2. **ASSIGNMENTS—Virginia Statute—New Causes of Action.**—The Virginia Statute making choses in action assignable, and authorizing an assignee to maintain in his own name any action which the original obligee might have brought, does not create any new causes of action, and has no application to cases in which there is no assignment.

Error to a judgment of the Circuit Court of Wise county, in an action of debt. Judgment for the defendants. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Vicars & Peery, for the plaintiff in error.

Ayers & Fulton, for the defendants in error.

WHITTLE, J., delivered the opinion of the court.

The single question presented by this record is whether the
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assignee of a judgment is entitled to maintain an action for damages against an officer and the sureties on his official bond, for a breach of the condition thereof which occurred prior to the assignment, by reason of his failure to return a forthcoming bond taken upon the judgment within the time and in the manner prescribed by statute to give such bond the force of a judgment against the obligors therein.

Upon demurrer to the declaration, the trial court resolved that question in the negative, and rendered judgment for the defendants; whereupon the plaintiff brings error.

The authorities are generally agreed that the assignment of a judgment carries with it "the cause of action on which it was based, together with all the beneficial interest of the assignor in the judgment, and all its incidents." Freeman on Judgments, sec. 431.

Upon the same principle the assignment of a note carries with it all securities provided for its payment.

The doctrine is founded upon the theory that the debt is the principal thing, and the security an accessory. They are not severable, and the security passes by virtue of the assignment as an inseparable dependent incident. *Carpenter v. Longan*, 16 Wall. 271, 21 L. Ed. 313.

It will be observed that the present inquiry does not involve the power of the judgment creditor to assign the right of action in question, but whether that right passed to the assignee as an incident to the assignment of the judgment.

Citizens National Bank v. Loomis, 100 Iowa 266, 69 N. W. 443, 62 Am. St. Rep. 571, is the only case to which our attention has been called which directly sustains the pretension of the plaintiff in error. In that case it was held that "the assignment of a judgment in an action in which an attachment has been allowed and property seized thereunder passes to the assignee the judgment creditor's right to recover damages of the sheriff for negligence in the care of property seized by allowing a disposition to be made of it."

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The reasoning upon which that decision is based is not satisfactory. It proceeds upon the false premise that the right to sue for the breach of official duty must exist somewhere, and as the assignor cannot sue, having parted with the judgment, the right of action must rest in the assignee—whereas, we apprehend, it appears by the weight of authority, that the right of action for the previous breach of duty by the officer, is a mere personal right which appertains to the judgment creditor.

The right to recover damages for the tort, it is true, is an incident to the judgment in the qualified sense that it belongs to the owner of the judgment at the time the injury is committed; but it is separate and distinct from the right to the judgment, both in its character and in respect to the persons liable to respond in damages for the wrong. It is a collateral right, over which the judgment creditor possesses exclusive dominion, which he may enforce or forbear to enforce, and may assign or withhold at pleasure.

The assumption, therefore, that the right to sue the officer exists in the assignee of the judgment, proceeds upon the hypothesis that it is such an incident as must necessarily pass by the assignment of the judgment, a conclusion which the authorities do not sustain.

Bouvier, in defining the word "incident," observes, "This term is used both substantively and adjectively of a thing which either usually or naturally and inseparably, depends upon, appertains to, or follows another that is more worthy. For example, rent is usually incident to a reversion (1 Hill R. P. 243); while the right of alienation is necessarily incident to a fee-simple at common law, and cannot be separated by a grant. 1 Washb. R. P. 54. So a court baron is inseparably incident to a manor, in England; Kitch. 36; Co. Litt. 151.

"All nominate contracts and all estates known to common law have certain incidents which they draw with them and which it is not necessary to reserve in words. So the costs incurred in a legal proceeding are said to be incidental thereto." 1 Bouv. L. D. (Rawles Rev.) 1006.

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It will be seen from the foregoing definition and illustrations, that the distinguishing characteristic of an *incident* consists in the fact that it "usually or naturally and inseparably depends upon, appertains to, or follows" its principal.

The distinction as to what does and what does not pass by incidental assignment is, in some instances, nice and difficult to draw, but in order for it to pass the incident must, in a legal sense, constitute a security for the debt, and that can hardly be predicated of a mere collateral right of action against a public officer for a *quasi* tort in failing to discharge an official duty, although his misconduct may affect the value of the judgment.

Accordingly, the Supreme Court of Kentucky, upon a similar state of facts, held that the assignment of a judgment could not operate to transfer the right to recover for such an injury, for a right to compensation for such an injury, and the right to the judgment, are separate and distinct rights. They are separate and distinct not only in their origin and nature, but in relation to the persons against whom they must be asserted. The right to compensation for the injury, may, indeed, be said to be incident to the right to the judgment in one sense, for it must necessarily belong to the person who was entitled to the judgment at the time the injury was done, but it is clearly not not such an incident as must necessarily pass by the assignment of the judgment." *Com'th for, &c., v. Fuqua*, 3 Little (Ky.) 41.

In *Redmond v. Staton* (N. C.), 21 S. E. 186, it was held that the "clerk of the court is liable for damages to a judgment creditor arising from his failure to properly index the judgment, so as to render it a lien on the judgment debtor's lands. The mere assignment of a judgment does not carry with it a right of action which has accrued to the judgment creditor against the clerk of the court for his failure to properly index the judgment, so as to render it a lien on the judgment debtor's lands." The court then cites with approval the case of *Timberlake v. Powell* (N. C.), 5 S. E. 410, as analogous au-

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thority, where the court says: "The present suit is not upon the judgment, but upon an alleged independent liability incurred by other tort-feasors . . . The cause of action is separate and distinct from that involved in the former adjudication, and is outside the scope of the assignment."

In *Robinson v. Town*, 30 Ga. 818, the court held that the assignment of the judgment did not pass any interest in the money which the sheriff had previously collected on the judgment. The court, at page 821, observes: "It was said that the plaintiffs could not maintain the suit, because they had parted with their interest by the assignment. They did part with their interest in the further enforcement of the judgment, but not with their interest in their money which the sheriff had previously collected. The assignee acquired and they lost the right to enforce the judgment as it stood at the time of the assignment, that is, the right to collect what was still due at the time of the assignment out of the defendants in it. Money previously collected and held by the sheriff would not be reached by the exercise of the assignee's right of enforcing the judgment, for such money was the fruit of the previous enforcement of the judgment to that extent. Such money constituted by a rule or suit against him." See also *Central R. & B. Co. v. Brunswick & Western R. Co.*, 87 Ga. 386, 13 S. E. 520.

While the Virginia statute has enlarged the rule of the common law so as to make choses in action assignable, and authorizes the assignee to maintain in his own name any action which the original obligee, etc., might have brought, it does not create new causes of action, and has no application to cases in which there is no assignment.

It would, in our judgment, be impolitic to extend the scope of the statute by judicial construction so as to allow the assignment of a chose in action to invest in the assignee, as an incident, a litigious right against a third party to recover damages for an injury which accrued prior to the assignment.

The conclusion reached in this case is not in conflict with the

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decision in *National Valley Bank v. Hancock*, 100 Va. 101, 40 S. E. 611, 57 L. R. A. 728, 93 Am. St. Rep. 933, where the court recognizes the established general doctrine that a mere right *in litem* is not the subject of incidental assignment, but enforces a qualification of the rule called for by the facts of the particular case. In that case the debtor, without consideration, in the interest of his children, divested himself of property to the prejudice of creditors. The diversion as to them was void, and hence they, or their assignees, had the right to follow the property, or its proceeds, and subject it to their debts in the hands of the alienee. The debtor's individual liability and diverted property were securities for the debt, and passed as incidents to the assignment.

The case under consideration is wholly different. The effort is not to hold the debtor or his property liable, but to maintain an action to recover damages on an individual liability of a third person to the judgment creditor.

The judgment complained of is without error, and must be affirmed.

Affirmed.

Statement.

Stanton.

NEECE v. NEECE AND OTHERS.

September 14, 1905.

1. **SPECIFIC PERFORMANCE—*Case in Judgment—Fraud.***—The evidence in this cause shows that the tract of land claimed by the appellant in his bill had been in the possession of the husband and father of the appellees for some time prior to his death; that he claimed it as his own in the presence of appellant, without dissent on his part; that he put valuable improvements thereon; that he caused it to be surveyed in the presence of appellant, with a view of taking a deed from him, and that appellant pointed it out as the land he was to convey him. If the evidence does not establish the fact that appellant gave or agreed to give to the husband and father of appellees, who was his brother, a title bond for the land, it clearly shows that the latter was in the possession of the land for a number of years under a contract or agreement so far executed that it would be a fraud upon his rights to now refuse an enforcement thereof.
2. **EXECUTORS—*Title Papers—Inspection by Parties in Interest.***—While an executor named in a valid will is entitled to the custody of testator's title papers, parties in interest have the right to see and inspect them.
3. **EVIDENCE—*Conduct as an Admission—Fraud.***—A party's conduct, so far as it indicates his belief in the weakness of his case, may be used against him as an admission, subject to any explanations he may be able to make removing that significance from his conduct. In particular, falsehood is a badge of fraud, and a case which is sought to be supported by deception may *prima facie*, until the contrary is shown, be taken as a bad and dishonest case.

Appeal from a decree in chancery of the Circuit Court of Dickenson county. Decree in favor of defendants. Complainant appeals.

Affirmed.

Opinion.

The opinion states the case.

A. A. Skeen, for the appellant.

Vicars & Peery and *Columbus Phipps*, for the appellees.

CARDWELL, J., delivered the opinion of the court.

The appellant, complainant in the court below, filed his bill in this cause alleging ownership of a boundary of about 40 acres of land situated on McClure creek, in Dickenson county, and sought to enjoin, and did enjoin, appellees from committing divers trespasses upon said land. To this bill appellees, the widow and children of John C. Neece, deceased, filed their answer, asked to be treated as a cross-bill, charging that they were the owners of the land in question; that John C. Neece in his lifetime had obtained from appellant a title bond for the land, and had been put in possession thereof, and had made valuable improvements thereon, etc., the prayer of the cross-bill being that appellant be required to convey to appellees the said land.

The answer of appellant to the cross-bill denied its allegations, but admitted that appellant did verbally agree to let John C. Neece have a small piece of land for a house seat; that John C. Neece built a house upon said small piece of land, which house and other improvements in the way of buildings were afterwards burned, whereupon said verbal agreement was annulled by like verbal agreement, and possession of said small piece of land was delivered back to appellant.

Upon the pleadings and depositions taken on behalf of both appellant and appellees, the Circuit Court made its decree, appealed from, dissolving the injunction theretofore awarded, and requiring appellant to convey to appellees the land in question.

The sole question presented, therefore, is whether or not the evidence in the record justifies the decree complained of.

The facts disclosed are as follows: During the civil war,

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or soon after its close, John C. Neece, as a settler, entered into actual possession of a tract of land, including the 40 acres in controversy in this suit; the section where the land is situated being covered by patents for large areas held in the names of non-resident claimants. He cleared and cultivated a portion of the land, lived upon it, and claimed it as his own, but some years later moved to West Virginia, after first trying without success to sell the land thus claimed by him to his neighbors, and after removal continued his efforts to sell without avail. During the absence of John C. Neece, one E. J. Long had a survey made which embraced the land in controversy, and soon afterward appellant made a trip, presumably to West Virginia, and upon his return represented to E. J. Long that he had bought the land claimed by John C. Neece, but had no title bond or other written evidence of his purchase; whereupon Long, without payment to him of any consideration, executed to appellant a quit claim deed to certain lands embracing the 40 acre tract in controversy. Sometime after this John C. Neece moved back to Virginia, found appellant in possession of his land, and obtained from him a title bond for the 40 acres in controversy or a verbal agreement to give up or release that much of it, and pursuant thereto John C. Neece immediately entered into possession of the land, built a substantial two-story log house and two corn cribs upon it, and cleared and fenced a considerable portion of the land, and made other permanent improvements thereon. These improvements were made some eight or ten years prior to the year 1900, and John C. Neece lived on the land, claiming and using it as his own from the completion of his dwelling until it was burned a short time prior to his death, which occurred in December, 1900.

In the mean time John C. Neece had bought another tract of land, known as the Keel and Turner land, on the opposite side of the creek from the land in controversy, and when his house was burned he moved into a small house on this Keel and Turner tract, but continued in the actual possession of the land

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in controversy. The upper portion of the Keel and Turner tract lay on the opposite side of the creek from the land of appellant upon which he lived, and his home place extended down near the house of John C. Neece which was burned. Two or three years before John C. Neece's death, he made a verbal agreement of exchange with appellant, by which he was to receive from appellant a small piece of land containing five or six acres off the lower end of appellant's land, adjoining the land in controversy, just above and near the house of John C. Neece, and in exchange therefor John C. Neece was to let appellant have a piece of land of like size off the upper end of the Keel and Turner land and near the house of appellant, which parcel agreement of exchange was, after the house of John C. Neece burned, rescinded by mutual consent.

Throughout the entire period that the land in controversy was occupied by John C. Neece, his right thereto was never questioned by appellant. On the contrary, it was surveyed at the instance of John C. Neece in the presence of appellant, with the view of a deed therefor being made to him, and appellant was heard to say repeatedly, in the presence of disinterested persons who have testified in this case, 'that he was ready to make the deed to John C. Neece, his brother, at any time, and on one or two occasions the land was pointed out in appellant's presence as the land he was ready to convey to John C. Neece at any time. The land was recognized by all the neighbors as being the land of John C. Neece. He sold timber off the land to the same saw-milling firm operating near by appellant's home, to whom appellant at the same time sold timber from his own land, and the timber was cut and hauled by John C. Neece from the land in controversy to the saw-mill, and his right to the timber so cut and delivered was never questioned by appellant, although he knew of it, and was a frequent visitor to the saw-mill.

Nine days after the death of John C. Neece, appellant appeared with what purported to be a will of John C. Neece, the existence of which was known only to himself and one other,

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written at appellant's house in his own handwriting, signed in the same handwriting, witnessed by himself and one E. B. Jessee (who testified in this case on behalf of appellant), naming appellant as executor of the will, and in which the Keel and Turner land of John C. Neece was disposed of, but no mention was made of the land here in controversy; and appellant sought to have the widow and heirs of John C. Neece sign a writing agreeing to the probate and recordation of the will without contest, which they declined to do. When asked by the widow and heirs why the land in controversy was not mentioned in said will, appellant then, and for the first time, made the claim that this 40 acre tract was the land which he was to exchange with John C. Neece for the five or six acres off of the Keel and Turner land, and that the contract of exchange had been rescinded before John C. Neece's death. This pretended will was afterwards offered by appellant for probate in the County Court of Dickenson county, and he and E. B. Jessee were examined as witnesses touching the same, but the court refused to admit the paper to probate as the will of John C. Neece, deceased. Thus a cunningly devised scheme on the part of appellant to put John C. Neece, deceased, in the attitude just before his death of making no claim to the land in controversy, and to which he, appellant, was not heard theretofore to make a claim, proved unavailing.

Belle Neece, a daughter, and Margaret Neece, the widow, of John C. Neece, testify that John C. Neece, had a title bond for the land from appellant, and the first named witness says that her father so stated in the presence of appellant, to which statement he made no dissent. These witnesses are corroborated touching the title bond by a witness introduced on behalf of appellant. Margaret Neece, the widow, and Louisa Holbrook, another daughter of John C. Neece, testify that while preparations were being made for his burial, they were looking over some title papers found in his clothes, when appellant appeared, took possession of all these papers, except one, and also of the clothes containing other title papers of the de-

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ceased, and they were never afterwards returned by him or seen by any member of the family of John C. Neece.

This testimony touching the conduct of appellant concerning the title papers held by John C. Neece is uncontroverted by appellant himself, who testified on his own behalf touching other matters in dispute.

As contended for by appellant, an executor named in a valid will has the right to the custody of the title papers belonging to his testator; but there is neither law nor reason for the parties in interest being denied the right to see and examine such papers.

In general, a party's conduct, so far as it indicates his own belief in the weakness of his cause, may be used against him as an admission, subject of course to any explanations he may be able to make removing that significance from his conduct. In particular, falsehood is a badge of fraud, and a case which is sought to be supported by means of deception may *prima facie*, until the contrary be shown, be taken to be a bad and dishonest case; and this applies equally to civil and criminal cases . . . so also the attempt to suppress evidence by intimidating or removing witnesses is admissible as having a tendency to show consciousness in him of title in the opponent. "Concealing or destroying evidential material is likewise admissible; in particular the destruction (spoliation) of documents as evidence of an admission that their contents are as alleged by the opponents." 1 Greenleaf Ev. (16 Ed.), sec. 195, at p. 325.

The circumstances proven, aside from the direct proof on the subject, warrant the presumption that when Jno. C. Neece returned from West Virginia and found appellant in possession of this land with a quit claim deed therefor from an outsider, for which no consideration whatever was paid, a dispute arose between them as to their rights, and that, by way of a settlement of the dispute, appellant agreed to and did execute to Jno. C. Neece a title bond for the 40-acre parcel here in question.

But if it could be conceded, even for the sake of argument, that the evidence is insufficient to establish the fact that John

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C. Neece had a title bond for the land in dispute, it clearly shows that he was in the possession of the land for a number of years under contract or agreement so far executed that it would be a fraud upon his rights to now refuse an enforcement of such contract or agreement.

It is not controverted that improvements amounting in value to \$300 or \$400, were put upon the land by Jno. C. Neece; nor that a division line was run by a competent surveyor at the instance of John C. Neece, and in the presence of appellant, so that "they would know how to make the deed"; nor that on another occasion when appellant, as well as John C. Neece, was present, the latter pointed out to a disinterested witness testifying in this case the lines of the 40-acre tract as the land owned by him, and that appellant made no claim whatever to the land. It is clearly proved also by several witnesses that on several occasions appellant told John C. Neece, in the presence of these witnesses, that he was ready to make him a deed for the land at any time, without a suggestion that he had not been fully paid therefor, and whereby it necessarily follows that the consideration for the land had been fully paid.

In addition to the facts and circumstances stated as going to discredit appellant and at least one of his principal witnesses in this cause, (E. B. Jessee,) the appellant stands impeached in this record by the testimony of five reputable citizens of Dickenson county.

The claim set up by appellant, that the land he was to let John C. Neece have in exchange for five or six acres of the Keel and Turner tract, afterwards rescinded, was the 40-acre tract in controversy and included John C. Neece's house site, was clearly an afterthought, absurd on its face, and plainly had its origin in a fraudulent design to take advantage of the death of John C. Neece, and a supposed inability on the part of his widow and children to defend their right to the land.

We are of opinion that the proofs in the cause fully justify the decree of the Circuit Court, and therefore it is affirmed.

Affirmed.

Statement.

Staunton.

CUPP v. LESTER.

September 14, 1905.

1. **VENDOR AND PURCHASER—Right to Redeem—Terms of Redemption—Case in Judgment.**—Under the terms of the agreement in suit allowing the former owner of land to redeem upon reimbursing the purchaser for principal, interest and costs expended by him in buying the land at a judicial sale thereof, it is not error to require such former owner, as a condition precedent to his right to redeem, to pay not only the amount expended as aforesaid, but also the balance owing by the former owner to such purchaser on a deed of trust given on a part of the land to secure a loan made by the purchaser to such owner.
2. **CONTRACTS—Fraudulent Procurement—Benefits.**—Where a party is induced by the false representation of another to enter into an agreement involving the outlay of money on the faith of certain property as security therefor, and, in consequence of such representations, he is wholly deprived of the security furnished by a large part of the property, and thereby sustains a large pecuniary loss, the party making such representations will not be allowed to claim the benefit of a stipulation in the agreement which is favorable to him and detrimental to the other party.

Appeal from a decree of the Circuit Court of Montgomery county. Application by Lester for a writ of possession against Cupp. Decree in favor of Lester. Cupp appeals.

Affirmed.

The following statement, taken from brief of counsel for the appellee, sets forth the facts as nearly as they can be gathered from the record:

Statement.

"A creditor's bill was pending against Anderson Cupp to enforce the liens against his lands. The lands had been rented by him from a receiver of the court, who held his bonds.

"He and his attorney applied to Lester for a loan of one thousand dollars, to be secured by a deed of trust on an 83½-acre tract of land, which they assured Lester would be the first lien thereon, and that the land was worth a good deal more than \$1,000. Lester took their word for it and loaned the money without any other knowledge or information than Cupp and his attorney gave him; and took a trust deed dated July 23, 1896, on the said tract.

"About half of the \$1,000 was applied to a debt to the Bank of Christiansburg, which was secured by the first lien on the 83½ acres, and an assignment of the debt was made to Lester, which eventually proved to be the only security he had. The residue was used to pay Cupp's rent to the court's receiver.

"Between the bank's trust-deed and Lester's deed there were nearly eleven hundred dollars of judgments, which bound all of Cupp's land, and a vendor's lien for over \$800.00 on one of the most valuable tracts of his land. The intermediate liens, including vendor's lien, amounted to over \$1,800.00, and the value of all the lands, as shown by the subsequent sales, was \$2,017.00, from which came the costs of the suit and sales, and the Bank of Christiansburg's trust deed; the net result being that the proceeds of sale lacked \$433.24 of reaching Lester's trust deed.

"The amount he received on the assignemnt from the bank of Christiansburg, to-wit, \$392.50, was a credit on the debt secured by his trust deed, but left a balance due him, including interest to date of sale, March 17, 1900, of \$758.54.

"In March, 1899, all of the lands were sold by a commissioner, and the sale, aggregating \$1,026.75, was reported to the May term of the court.

Statement.

"On the first day of the court Lester went to see Cupp, and looked at some of the lands. Cupp asked him to put in an upset bid, and on the next day, May 11, they entered into the agreement in question, which was drawn by Cupp's counsel.

"It recites that Lester agreed to put in an upset bid (amount not stated) for six parcels of Cupp's land, and to pay off the *liens reported* by Commissioner Farley, that were prior to Lester's deed of trust, excluding one named judgment, and that Cupp, in consideration thereof, agreed to give Lester one-half of the coal in one of the tracts, containing 100 acres.

"It then provides, 'in case Lester buys the lands to protect himself and Cupp can reimburse him for principal, interest and costs expended in buying said lands, then Cupp is to have said lands back, but this last clause shall in no wise affect either interest in the coal on the 100 acre tract, in all events this contract is to give Geo. E. Lester one-half interest in said coal, and retains the other half as Cupp's.'

.

"Lester at once put in an upset bid, advancing the price of all the land to \$1,136.00; Cupp filed exceptions to the commissioner's report, and the land was resold, Lester buying five of the parcels, and J. C. Haynes, who had the vendor's lien for over \$800.00, buying the tract, on which that lien rested, at \$700.00. Exceptions were filed to the sale of three of the parcels purchased by Lester, and another sale was ordered and made, at which he again purchased them, and this sale was confirmed. The net result of all the sales was as hereinbefore stated.

"The Haynes vendor's lien was not *reported* by Commissioner Farley.

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"After the sales to Lester were confirmed, he gave notice that he would ask for a writ of possession. Cupp defended that motion, set up the May 11th agreement, claimed that Lester had not complied with it, and that, until Lester paid the debts,

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he was not entitled to possession, and prayed that the interests of himself and Lester in the coal be fixed and that a reasonable time be given him in which to reimburse Lester what Lester had paid or might be compelled to pay.

"The court awarded the writs of possession November, 1900, and, November, 1902, made a settlement between Cupp and Lester, found Cupp indebted on the trust deed debt, \$758.52, which sum, with interest, it decreed against him, found that Lester had paid for the lands purchased by him, \$1,287.50, and gave Cupp the right to redeem the lands, except one-half of the coal, by paying, within ninety (90) days, both of said sums; from this decree Cupp has appealed."

Wm. Gordon Robertson and Moore & Harless, for the appellant.

Archer A. Phlegar and M. H. Tompkins, for the appellee.

WHITTLE, J., delivered the opinion of the court.

The object of the suit out of which this controversy arose was to subject the real estate of the appellant, Anderson Cupp, to sale to satisfy liens.

Pending the litigation, appellant, accompanied by his counsel, sought the appellee, George E. Lester, who was not a party to the suit, and procured of him a loan of \$1,000, to secure which Cupp executed a deed of trust on a tract of 83½ acres of land, which was represented to Lester as affording ample security for the debt. Subsequently, when the cause had reached the stage where the lands had been sold and a confirmation of the sales was being pressed, Cupp again approached Lester, and, in consideration of his agreeing to prevent the confirmation of the sales of several parcels of the land by putting in upset bids, the following contract was entered into:

"That whereas, Geo. E. Lester agrees to put in an upset bid

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on six tracts of land sold on 4th March, to-wit, 83-½ acres, 50 acres, 37 acres, 9 acres, 100 acres, one-half interest in 50-acre tract, and pay off the liens reported by Com'r. Farley, that are prior to the deed of George E. Lester's deed of trust . . . Now, the said Cupp, in consideration of the premises, agrees to give to Geo. E. Lester a one-half interest in the coal on the one hundred-acre Miller tract; that is to say, that in consideration of this accommodation Lester is in any event to have one-half interest in that coal, and Cupp one-half interest. In case Lester buys the lands to protect himself, and Cupp can reimburse him for principal, interest, and costs, expended in buying said lands, then Cupp is to have the said lands back, but this last clause shall in no wise affect either interest in the coal on said 100-acre tract, in all events this contract is to give Geo. E. Lester one-half interest in said coal, and retains the other half as Cupp's."

At re-sales of appellant's lands upon the upset bids appellee became the purchaser of the six tracts referred to at the aggregate price of \$1,287.50.

The cause was heard upon a rule against appellant to show cause why a writ of possession should not be awarded requiring him to deliver to appellee the possession of the lands purchased by him, and upon the pleadings and evidence. Whereupon the trial court passed the decree complained of, which ascertained the amount due from Cupp to Lester to be \$2,046—\$1,287.50, part thereof, representing the sum paid by Lester for the lands purchased by him at the re-sale, and \$758.50, the residue thereof, being the unpaid balance due upon the \$1,000 loan secured by deed of trust. The decree also provided, that upon appellant paying to appellee said sums within 90 days from the adjournment of the court, the latter should convey to the former the lands in question with the exception of one-half interest in the coal on the Miller tract. Alternatively, the decree provided, that upon the failure of appellant to pay the amounts decreed against him within the time prescribed, he should be forever barred from demanding or claiming any interest in said lands.

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The first assignment of error involves the action of the court in requiring the appellant to pay to Lester the balance of \$758.50, due on the loan of \$1,000.

With respect to that assignment, it appears that the bank of Christiansburg held a first lien on the 83½-acre tract, which Lester discharged out of the \$1,000 loaned to Cupp, and took an assignment of the bank's lien. To the extent of that lien, therefore, by substitution to the right of the bank, Lester was reimbursed at the subsequent sale of that property; but the entire proceeds of sale of the residue of Cupp's lands were consumed in the liquidation of liens prior to Lester's deed of trust, so that the balance due thereon was never paid. Hence there was no error in the decree requiring Cupp to pay that balance as a condition precedent to his right to redeem the lands purchased by Lester.

The remaining assignment of error deserving notice relates to the ruling of the court denying appellant the benefit of the stipulation in the contract with respect to one-half the coal on the Miller tract.

In that connection it appears that there was a vendor's lien on the 37-acre tract of land mentioned in the agreement, amounting with interest to over \$800, which was afterwards bought by the vendor for \$700. That lien was not included in the report of Commissioner Farley, and was represented by appellant to have been satisfied. Appellee was thus induced by the false representation of appellant to enter into the agreement and wholly deprived of the security afforded by that property. Under the foregoing circumstances, the court was justified in denying appellant the benefit of the stipulation with regard to the one-half interest in the coal.

Upon the whole case, the decree is without error, and must be affirmed.

Affirmed.

Syllabus.

Staunton.

PRUDENTIAL FIRE INSURANCE COMPANY V. ALLEY.

September 14, 1905.

1. FIRE INSURANCE.—*Iron Safe Clause—Books of Account—Inventory—Warranty.*—The “iron safe clause” in a fire insurance policy by which the assured covenants and warrants that he will take an annual inventory and keep certain books of account, and upon failure to produce such books and inventories for the inspection of the insurer the policy shall be void, is a warranty, and a compliance therewith is essential to the validity of the policy.
2. FIRE INSURANCE.—*Warranties—Code, § 3344a.*—The provisions of Code (1904), Sec. 3344a, relating to answers to interrogatories made by an applicant for a policy of insurance, have no application to the warranties contained in the “iron safe clause” of fire insurance policies.
3. FIRE INSURANCE POLICY.—*Doubtful Language—Constructions.*—If the language of a warranty in an insurance policy is susceptible of two constructions, the words used are to be construed most strongly against the insurance company, as they are the language of the company, prepared by its agents, officers or attorneys.
4. FIRE INSURANCE.—*Books of Account—What Sufficient.*—The stipulation in a fire insurance policy that the assured will keep a “set of books which shall clearly and plainly present a complete record of the business transacted, including all purchases, sales and shipments both for cash and on credit,” is satisfied if the books are kept in such a manner as that, with the assistance of those who kept them or understood them, the amount of the purchases and sales can be ascertained, and cash transactions distinguished from credit. The books need not be such as an expert accountant in a large business would keep, nor need they give an itemized statement of all goods purchased since the last inventory, nor of the goods sold. If they show the amount of each bill of goods purchased, when and from whom, and the amount of each day's sales, and it appears that no goods were sold on credit, it is sufficient.

Statement.

5. **FIRE INSURANCE—Inventory.**—The “iron safe clause” of a fire insurance policy, requiring an inventory of goods to be taken within twelve months, is sufficiently complied with where it is made to appear that an inventory had been taken within the prescribed period, and that the articles not covered by the policy were accounted for as if sold for cash.
6. **FIRE INSURANCE—Increase of Risk—Expert Evidence.**—It is not error to reject expert evidence offered to show that the erection of a building near the property destroyed was an increase of risk. This is a question for the jury upon all the facts and circumstances in proof, and is not a question for the determination of which expert knowledge is either necessary or proper.
7. **FIRE INSURANCE—Value of Goods Destroyed—Opinion Evidence.**—It is not error to permit witnesses to testify as to the value of the goods destroyed, based upon what they saw in the store-house, where one of the defenses to the action on a policy to recover their value is fraud in the procurement of the policy, and fraud and false swearing after the fire.
8. **FIRE INSURANCE—Declaration of Employee of Agent—Case at Bar.**—Upon the evidence in this case, it is held that the person through whom the policy in suit was issued was an employee of an agent of the defendant, and that his declarations at the time the policy was issued are receivable in evidence against the company.
9. **FIRE INSURANCE—Building and “Addition”—Subsequent Erections—Parol Evidence.**—Where an insurance policy covers a building and “addition,” parol evidence may be received to show that at the time the policy was issued there was no “addition” to the house, but that it was agreed that an “addition” should be made at once, and that the building without the “addition” was not worth the valuation put upon it by the company’s agent. This does not contradict, nor add to the contract of the parties, but merely shows that the word “addition” in the policy referred to one to be built instead of to one already in existence.
10. **FIRE INSURANCE.—Proof of Loss—Sufficiency.**—Where the loss under an insurance policy on a stock of goods is total, if the proof of loss is in substantial compliance with the conditions of the policy it will be deemed sufficient, although it fails to give the cash value of each item insured and the amount of loss thereon as required by the policy.

Error to a judgment of the Circuit Court of Wise county, in an action of *assumpsit*. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

Statement.

This was an action of assumpsit on a fire insurance policy to recover for a total loss of a store-house and stock of goods destroyed by fire. After all the evidence was in, the defendant demurred to the evidence, and the plaintiff joined in the demurrer, and the court rendered a judgment thereon for the plaintiff.

The facts sufficiently appear in the opinion of the court except as to the proof of loss. The proof of loss was made in the form given below, and along with it, and as a part thereof the plaintiff tendered his own affidavit, and the affidavits of sundry persons who had recently seen the store-house and stock of goods, and who, basing their opinions upon knowledge thus acquired, estimated the value of the store-house at about \$1,000, and the stock of goods at different sums, varying from \$4,000 to \$8,000. The trial court admitted in evidence this proof of loss and the affidavit of the plaintiff, but refused to allow the other affidavits to be read in evidence. The plaintiff also offered in evidence the books referred to in his affidavit, kept in connection with his business, and they were received over the objection of the defendant. The proof of loss so admitted and the affidavit of the plaintiff are as follows:

“PROOF OF LOSS SUBMITTED BY J. J. ALLEY, PLTF.

“To J. F. Hurt,

“Agent for the Prudential Fire Insurance Co.

“Proof of loss sustained by J. J. Alley on one story frame and metal roof store building and additions, &c., situated on the east side of Main street, in the town of Appalachia, Wise county, Virginia, and on stock of general merchandise contained in the above-described building by reason of the fire of Jan. 1, 1904.

“Policy No. 24,415.

“J. J. ALLEY,
“Insured.

Statement.

"Virginia,

"Wise county, to-wit:

"This day J. J. Alley, personally appeared before me, the undersigned, justice of the peace, in and for the State and county aforesaid, and made oath in due form of law, that he was the sole owner of the store house and stock of goods at Appalachia, Wise county, Virginia, that he had said store house and stock of goods insured in the Phoenix Insurance Company, of Brooklyn, New York, and in the Prudential Fire Insurance Company, of Tazewell, Virginia, as shown by policies No. 33,867 in the Phoenix and No. 24,415 in the Prudential, that said store house and stock of goods were destroyed by fire on the morning of January 1, 1904, that he sustained a total loss of the property insured, that his loss is as follows:

"On the store house.....\$1,000.00

"On the stock of goods..... 6,655.75

"Total loss.....\$7,655.75

as shown by the depositions and itemized statements, sworn to and filed herewith as part hereof; that said property was unincumbered at the time of the fire; that there had been no change in the ownership of said property since the aforesaid policies were issued; that the origin of said fire is unknown to affiant; that there has been no change in the title, use, occupation, location, possession or exposures of said property since the issuing of said policies; that said store house was used by affiant for store purposes at the time of the fire; that affiant had no other insurance on said property than those hereinbefore mentioned and that he files herewith as part hereof, the depositions of W. V. Thompson, T. B. Thompson, Wm. C. Taylor and others as part hereof.

"J. J. ALLEY.

"Sworn to and subscribed before me February 5, 1904.

"R. J. SHEPARD,

"Justice of the Peace."

Statement.

"DEPOSITION OF J. J. ALLEY.

"J. J. Alley, a witness of lawful age, being first duly sworn deposes as follows:

Q. 1. State your age, residence, and occupation?

A. 46 years old, Gate City, Va., my family lives in Bristol, Tenn., but my office and principal business is at Gate City, Va., timber and lumber dealer.

2. Were you the owner of a store house and stock of goods in the town of Appalachia, Wise county, Va.?

A. Yes, sir; I was.

3. Did you have any insurance on them? If so, state what companies, give the amount of insurance and the number of the policies?

A. I did; one was in the Prudential Fire Insurance Co., of Tazewell, Va., and numbered 24,415 for \$2,625.00, and also an insurance in the Phoenix Insurance Co., of Brooklyn, No. 33,867, for \$2,625.00.

4. Were your store house and stock of goods destroyed by fire, if so, state as nearly as you can the date of the fire?

A. They were, and on January 1, 1904, as I understand it.

5. Were you the sole owner of the store house and stock of goods?

A. I was.

6. Did you own in fee simple, and do you now own the land on which the store house was situated?

A. I did and do still.

7. Do you know anything of the origin of the fire?

A. I do not.

8. Was there anything saved from the fire?

A. Not that I know of.

9. Was it a total loss?

A. It was.

10. When did you take an inventory of your stock of goods?

A. About June 10, 1903.

Statement.

11. What was the amount of your inventory at that time?
A. \$3,186.37.

12. Please give an itemized statement of your loss on the stock of goods by reason of the fire, as shown by your books, bills, &c.?

A. Amount of stock as per invoice of

June 10, 1903.....	\$3,186 37
Amount purchases since.....	5,102 43
Amt. freight paid on purchases.....	89 43
25% profit on sales.....	390 61
	\$8,768 84

Less:

Total sales.....	\$1,953 05
Goods short.....	6 00
Goods returned.....	6 60
Goods returned.....	125 55
Goods in depot.....	17 89
Error in invoice.....	4 00
	\$2,113 09

Loss in stock.....\$6,655 75

13. Is the above statement a correct statement taken from your books?

A. It is.

14. What was your loss on the store-house?

Ans. My opinion, without an itemized calculation, is about \$1,000.00.

15. Have you the books from which the above statement was made?

A. I have the books and invoices.

16. Where was your store-house situated?

A. On the east side of Main street, in the town of Appalachia, Wise county, Virginia.

Statement.

17. You have heretofore stated that you had the same property insured in the Prudential Fire Insurance Company; give the stipulation in said policy?

A. \$750.00 on one story, frame and metal roof store building, and additions, to include foundations and all permanent fixtures and attachments and counters and shelving as a part of the building, situated on the east side of Main street, in the town of Appalachia, Wise county, Virginia; \$4,500.00 on stock of general merchandise, of every description contained in the above described building. This policy covers *pro rata* for one-half of the above named items, amounting in the aggregate to \$2,625.00.

Q. Who had charge of your store at Appalachia?

A. T. J. Templeton.

19. Where were you at the time of the fire?

A. I was at Gate City.

20. When were you last in your store at Appalachia?

A. It was a few days before Christmas, 1903.

21. Was the property destroyed by fire—that is, the store-house and the stock of goods, in any way encumbered?

A. They were not.

22. Have you kept a set of books which clearly and plainly show or present a complete record of the business transacted including all purchases, sales, and shipments, both for cash and credit from the date of your inventory, June 10, 1903?

A. I have.

23. Had you any other insurance on said property—the store-house and stock of goods at Appalachia, Wise, Virginia, than those hereinbefore mentioned?

A. I had not.

And further this deponent saith not.

J. J. ALLEY.”

Henry & Graham and Geo. W. St. Clair, for the plaintiff in error.

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Irvine & Stemp and W. S. Cox, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This action was instituted to recover the amount alleged to be due upon a fire insurance policy issued by the Prudential Fire Insurance Company covering such losses as might be sustained by the insured, J. J. Alley, in consequence of the destruction by fire of his store-house and a stock of goods in the town of Appalachia.

Immediately prior to the time the policy sued on was issued, the insured was doing business as a merchant in Gate City, in Scott county, but was about to remove his stock of goods into a store-house in Appalachia, in Wise county. Before moving the stock of goods from Gate City to Appalachia, the insured took an inventory of his stock, completing the inventory on the 10th of June, 1903. He then shipped the goods to Appalachia, except a few articles, and commenced business there on June 18. On the 25th day of that month the policy sued on was issued. On the 29th of the same month a permit was issued, authorizing the insured to make an addition to the building insured. Business was conducted there until the morning of January 1, 1904, when the store-house and its contents were destroyed by fire.

The policy contained what is known as the "iron safe clause," which is as follows:

"WARRANTY TO KEEP BOOKS AND INVENTORIES, AND TO PRODUCE THEM IN CASE OF LOSS.

"Iron Safe Clause.

"The following convent and warranty is hereby made a part of this policy:

"1st. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless

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such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned.

“2d. The assured will keep a set of books which shall clearly and plainly present a complete record of the business transacted, including all purchasers, sales, and shipments, both for cash and credit, from date of inventory as provided for in the first section of this clause, and during the continuance of this policy.

“3d. The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fire-proof safe at night, and at all times when the building mentioned in this policy is not actually open for business; or failing in this, the assured will keep such books and inventories in some place not exposed to fire which would destroy the aforesaid building.

“In the event of failure to produce such set of books and inventories for inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon.”

One of the defenses relied on by the insurance company was that the terms and conditions contained in that clause had not been kept and performed by the insured. To sustain his contention that he had complied with the iron safe clause, the insured introduced in evidence over the insurance company's objection the inventory taken at Gate City, referred to above, two books, one to show the purchases and the other the sales made by the insured while doing business at Appalachia, and certain witnesses to explain the manner of keeping the books. The objection made to the inventory introduced was that it was taken before the goods went into the building at Appalachia; that no complete inventory of the stock of goods insured was ever taken; and that the inventory introduced in evidence

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includes many articles not covered by the policy. The book of purchases was objected to because it does not give the items or articles claimed to have been purchased, nor show that they were such articles as were covered by the policy. The objection made to the book of sales was that it furnishes no data from which the insurance company could tell what had been sold, at what profit, or for what price, but merely purports to give the cash taken in each day. It is further objected that the books introduced do not "clearly and plainly present a complete record of the business transacted, including all purchases, sales, and shipments for cash and credit from the date of the inventory," as provided by the policy. The insurance company insists that the iron safe clause was a warranty, and that, being a warranty, a literal compliance with its terms was a condition precedent to the right of the insured to recover.

In the case of the *Virginia F. & M. Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191, where, in the application for a policy of fire insurance, the insured was asked if he would keep his account books in an iron safe or secure in another building and he answered in the affirmative, the statement was held to be a warranty.

If the undertaking in that case by the insured that he would keep the books required to be kept in an iron safe or secure in another building was a warranty, the agreement to take the inventory and keep the books required is also a warranty, because the covenant is the same as to all. The decision in the *Morgan* case seems to be in accord with the weight of authority. *Scottish Union, &c., C. v. Stutts* (Ga.), 27 S. E. 180; *Western Assur. Co. v. Alzheimer* (Ark.), 25 S. W. 1067, 1069; *Note to Conn. Fire Ins. Co. v. Leary*, 51 L. R. A. pp. 699, 715, and cases cited.

But it is insisted by the insured that the doctrine announced in that case has been changed by the Act of the General Assembly, found in sec. 3344a of the Va. Code of 1904, which provides that "no answer to any interrogatories made by an applicant

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for a policy of insurance shall bar the right to recover upon any policy issued upon such application, by reason of any warranty in said application or policy contained, unless it be clearly proved that such answer was wilfully false, or fraudulently made, or that it was material."

This statute by its terms only applies to a policy of insurance issued upon an application in which the insured has answered interrogatories (as he did not in this case) about matters as to which such answer was wilfully false or fraudulently made, and not to conditions of the kind contained in the clause now under consideration. This clause binds the insured to do certain things for the protection of the insurance company, and is important as furnishing a check against fraud on the part of the insured, and a mode by which the insurance company may ascertain the extent of the loss. A compliance by the insured with this clause is a condition upon which, by the express terms of the contract, the validity of the policy is made to depend.

But while the iron safe clause is a warranty, yet if it is so framed as to leave room for two constructions, the words used should be construed most strongly against the insurance company, upon the ground that the company's attorneys' officers, or agents, prepared the policy, and it is the company's language which is to be interpreted. *Liverpool & London, &c., Co. v. Kearney*, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460, and cases cited; *Georgia Home, &c., Co. v. Bartlett, Tr.*, 91 Va. 305, 21 S. E. 476, 50 Am. St. Rep. 832; 1 Joyce on Insurance, sec. 222.

The clause under consideration is now generally introduced into policies of insurance of merchandise kept for sale against loss by fire, and has frequently been considered by the courts, and most usually has not been subjected to any narrow or close construction. Legal effect has been given it for the purpose of guarding the insurer against fraud or imposition on the part of the insured, but it has received a fair and reasonable

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interpretation so that it might not work forfeitures or defeat the claim of the innocent to the indemnity promised by the policy. If the books are kept in such a manner that, with the assistance of those who kept them or understood the system, the amount of purchases and sales can be ascertained, and cash transactions distinguished from credit, it will be sufficient. *Insurance Co. v. Ellington* (Ga.), 21 S. E. 1006; *Western Ass., &c., Co. v. McGlathery* (Ala.), 22 So. Rep. 104, 108, 67 Am. St. Rep. 26.

In discussing the proper rule for interpreting the iron safe clause, the Supreme Court of the United States, in the case of *L. & L. Ins. Co. v. Kearney, supra*, said: "Turning now to the words of the policies in suit, what is the better and more reasonable interpretation of those provisions so far as they relate to the issues in this case? The covenant and agreement 'to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business' should not be interpreted to mean such books as would be kept by an expert bookkeeper or accountant in a large business house in a great city. That provision is satisfied if the books kept were such as would fairly show to a man of ordinary intelligence 'all purchases and sales both for cash and credit.'"

In the case of *Western Assurance Co., &c., v. McGlathery, supra*, where the iron safe clause was substantially, if not identically, the same as in this case, the Supreme Court of Alabama, in discussing the degree of clearness and plainness which must be observed in the entries on the books, said: "Is it that degree which will be satisfactory to an expert or scientific bookkeeper? If so, what system of bookkeeping must be observed? There are rival systems of bookkeeping, and the adepts in the one may regard the other as wanting in plainness and clearness. Or is it the degree which will satisfy the mind of the inquirer after the true state and condition of the business, not seeking to work or to avoid a forfeiture of the indemnity of the policy?"

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How many books and of what description will constitute a set? Can it be said or supposed that the mind of the insurer and the insured met, and would have given a common answer to those inquiries? Their minds did come together on the essence and substance of this clause, when its words are looked through—that it was the duty of the insured to preserve in intelligible form, in one or more books of his own choice, written evidence of his purchases, of his sales, and of his shipments.”

The books in the case under consideration were not kept as books would be kept by an expert book-keeper or accountant in a large business house in a great city, but such book-keeping was not to be expected of a store-keeper in a little mining town, and if the insurer expected it, it ought to have said so in plain language.

The articles embraced in the inventory taken at Gate City which were not shipped to Appalachia are shown to have been accounted for as if sold for cash. While the book of purchases does not give an itemized statement of all goods purchased after the inventory was taken, it does show the amount of each bill of goods purchased, when, and from whom. Neither does the book of sales give an itemized statement of the goods sold, but it does give with a few exceptions which are satisfactorily explained, the amount of each day's sales. It clearly appears that no goods were sold or authorized to be sold by the insured upon credit, and that such goods as were sold without being paid for by the purchaser were treated as cash sales on the book of sales, and accounted for as cash by the clerk who sold them. The claim that certain shipments were made which the books do not show is not clearly established.

We are of opinion that the provisions of the iron safe clause in this case, under all the facts and circumstances of the case, were substantially complied with by the insured.

The refusal of the court to permit the introduction of expert evidence to show that the erection of a building near the storehouse of the insured was an increase of risk is assigned as error.

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Whether or not the erection of the building was an additional risk was for the jury to say, upon all the facts and circumstances in proof, and was not a question to determine which expert knowledge was either necessary or proper. 4 Joyce on Ins., sec. 3818; *Va. Iron, &c. Co. v. Tomlinson*, ante, p. 249, 51 S. E. 362, 11 Va. L. Reg. 374, 377.

The action of the court in permitting witnesses to testify as to the value of the goods destroyed, based upon what they saw in the store-house, is assigned as error.

One of the defenses relied on by the insurer was that the insured was guilty of fraudulent conduct in procuring the policy of insurance, and guilty of fraud and false swearing after the fire. Upon these charges the evidence objected to was clearly relevant, if upon no other ground.

The action of the court in permitting certain declarations of Bond, through whom the policy sued on was issued, is assigned as error.

The objection made to that evidence is that it not only was not proved that he was the agent of the insurer, but, on the contrary, it appears that he was an insurance solicitor or broker. The evidence shows that the Hurt Insurance Agency, of Tazewell, was an agent of the defendant company and authorized to issue its policies, and that it did issue the policy sued on; that Bond was furnished with blank applications by that agency and solicited insurance for it; that he went to the insured, representing that he was working for the agency, and induced the insured to take out the policy sued on, which was afterwards issued by the Hurt Insurance Agency; that Bond was authorized to deliver policies and collect premiums issued upon applications made by him and accepted by the Hurt Insurance Agency, and to retain his commissions out of the premiums; that he did deliver the policy in question and most probably collected the premium, and, a few days after the policy was issued, procured the building permit which he said the insurance company would issue when he induced the insured to take out the policy. The

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president of the Hurt Insurance Agency, who was also a director in the defendant company, admitted that Bond solicited insurance for his agency, but denied that he did so exclusively, and denied, or at least expressed the opinion that Bond was not in the employment of his agency. It does not appear that Bond procured fire insurance for other agencies or companies, though there is evidence that he attempted to do so.

It is clear from the evidence that the insured did not regard Bond as his agent, or as acting for him in procuring the policy in question.

Under all of the facts of the case, we do not think that Bond can be regarded as a mere insurance broker, but should be considered an employee of the Hurt Insurance Agency, an agent of the defendant company authorized to issue its policies, and that the evidence in question was therefore admissible, under our decisions. *Goode v. Georgia Home Ins. Co.*; 92 Va. 392, 23 S. E. 744, 30 L. R. A. 842, 53 Am. St. Rep. 817; *Mutual Fire Ins., &c., v. Ward*, 95 Va. 231, 236 *et seq.*, 28 S. E. 209.

The court permitted evidence to go to the jury as to the value of the building described in the policy after an addition had been put to it, instead of confining the evidence to the value of the building as it was when the policy was issued. This is assigned as error.

At the time the policy was issued the insured testified that he told Bond, the solicitor or agent, that he wished to extend the building back about thirty feet and increase his stock of goods; that Bond fixed the value on the house including the addition which was to be put to it at \$1,000 and said he would give him \$750 insurance on the building, and have issued a building permit, which was done four days afterwards. The building insured is described in a typewritten paper attached to the policy as a "one story frame and metal roof store building, and addition." That the word "addition" was intended to cover the addition to be built, and not an existing addition, is clear from the fact that at that time there was no addition to the building,

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and from the further fact that the building as it then existed was not worth \$1,000. The parol evidence does not contradict or add to the contract between the parties. It merely shows that the word "addition" in the policy clearly had reference, under all the facts and circumstances of the case, to an addition to be built instead of to one already in existence, and was therefore admissible in order to enable the court to properly interpret the policy. Brown on Parol Ev., sec. 53; Elliott on Ev., sec. 597; Joyce on Ins., secs. 185, 3808. The court did not err in admitting that evidence nor in giving instructions to the jury based upon it.

The court admitted as evidence the paper filed as proof of loss, and this is assigned as error.

The objection made to that paper is that the insured failed to give the cash value of each item insured, and the amount of loss thereon covered by the policy, as required by the same.

The destruction by the fire was total, and we are of opinion that the proof of loss was a substantial compliance with the conditions of the policy, which is sufficient under our decisions. *Home Ins. Co. v. Cohen*, 20 Gratt. 312; *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 755, 30 S. E. 366.

Upon the whole case we are of opinion that there is no error in the record to the prejudice of the insurer, and that the judgment complained of should be affirmed.

Affirmed.

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GRAVES v. SCOTT AND ANOTHER.

September 14, 1905.

1. **MALICIOUS PROSECUTION—*Termination of the Prosecution.***—In an action for malicious prosecution it is essential for the plaintiff, amongst other things, to allege and prove that the criminal prosecution which is the basis of the action has terminated in a manner not unfavorable to the now plaintiff. There need not have been a trial on the merits. It is sufficient that the prosecution has terminated in such manner that it cannot be reinstated nor further maintained without commencing a new proceeding. Only the particular prosecution need be ended. It is immaterial that a new one for the same alleged offence may be set on foot. *Ward v. Reasor*, 98 Va. 399, *overruled*.

Error to a judgment of the Circuit Court of Giles county, in an action of trespass on the case. Judgment on demurrer for the defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

A. H. Woodyard, for the plaintiff in error.

Williams & Farrier and *Williams & Williams*, for the defendants in error.

KEITH, P., delivered the opinion of the court.

This is an action for malicious prosecution, in the Circuit

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Court of Giles county, in which the defendants demurred to the declaration. The only question raised is whether or not it is sufficiently averred that the prosecution had been terminated, which was alleged to have been maliciously instituted.

It seems that the defendants had charged Graves with having procured goods and chattels of them under false pretences, and under a warrant issued by a justice he was arrested and entered into a recognizance for his appearance before the justice upon a day named. When the day arrived, the declaration proceeds to set forth, that "the said plaintiff in obedience to said recognizance, appeared before the said justice at the said place designated for trial, and had with him his witnesses to prove and establish his innocence of the said supposed offence charged in the said warrant and complaint, and announced his readiness for a trial to the said justice and to the said Scotts, and insisted upon a trial then and there, but the said defendants refused and declined to be sworn and give any evidence touching the supposed crime charged in said warrant against said plaintiff, and failed to offer and produce, and refused to offer and produce, when called upon, any evidence whatsoever to prove the charge in said warrant against the said plaintiff, and then and there the said justice aforesaid dismissed the said warrant at the costs of the said Scotts, and then and there caused the said plaintiff to be discharged out of custody, fully acquitted of the said supposed offense, and the said defendants have not further prosecuted the said complaint, but have deserted and abandoned the same, and the said complaint and prosecution is now fully ended."

The demurrer was sustained, and a writ of error brings the case before us for review.

In *Ward v. Reasor*, 98 Va. 399, 36 S. E. 470, this court held, that "in an action for malicious prosecution it must be charged and proved, among other things, that the prosecution alleged in the declaration was conducted to its termination, and that it ended in the final acquittal of the plaintiff. An

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allegation that an offence of which a justice of the peace had jurisdiction was dismissed by him 'without the introduction of any testimony' or that the defendant 'without the introduction of any testimony' caused the plaintiff to be discharged, and not prosecuted for said offense, is not such an averment of the final termination of the prosecution as will support an action for malicious prosecution. It amounted to no more than a *nolle prosequi*, which was no bar to a further prosecution for the same offence. It did not establish the innocence of the plaintiff, or show want of probable cause on the part of the defendant."

It is obvious, therefore, that the case under consideration must be affirmed if we adhere to the law as propounded in *Ward v. Reasor*. The conclusion there reached is supported by Hilliard on Torts, by Greenleaf, by Mr. Minor in his institutes, by Barton in his Law Practice, by the Supreme Court of Massachusetts in *Bacon v. Towne*, 4 Cush. 217, and by a *dictum* by Judge Burks in *Scott & Boyd v. Shelor*, 23 Gratt. 891.

The opportunity for a more extensive research, and a further consideration of the principles involved, have led us to a different conclusion.

It is true that public policy favors prosecution for a crime, and requires that a person who in good faith and upon reasonable grounds institutes proceedings upon a criminal charge shall be protected. 19 Am. & Eng. Encyc. of Law, p. 650.

It is the lawful right of every man to institute or set on foot criminal proceedings wherever he believes a public offense has been committed. But it is a duty which every man owes to every other not to institute proceedings maliciously which he has no good reason to believe are justified by the facts and the law. Newell on Malicious Prosecution, sec. 1.

The difficulty, therefore, presented is to protect the citizen

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against criminal proceedings which are not justified by the facts and by the law, being at the same time careful not unduly to deter men from the institution of criminal proceedings honestly intended to punish public offenses against the law.

To meet and harmonize these difficulties as far as practicable, the law requires that the plaintiff in an action for malicious prosecution must avail and prove the institution of the suit or proceeding without reasonable cause; malice in the institution of the suit or proceeding; and the complete termination of the suit or proceeding. If a plaintiff in a suit for malicious prosecution can maintain these propositions to the satisfaction of a jury, he may and should recover damages; nor would the result tend to deter others from the honest and fearless prosecution of offenders against the law.

In *Scott & Boyd v. Shelor*, *supra*, Judge Burks states, that to warrant a recovery in a suit for malicious prosecution it must be proved that the prosecution alleged in the declaration had been set on foot and conducted to its termination. Had he stopped there, he would have been in entire harmony with the law as stated in *Newell on Malicious Prosecution*; but he goes further and says, "and that it ended in the final acquittal and discharge of the plaintiff." It is true that in the case which Judge Burks was considering there had been a final acquittal and discharge of the plaintiff, and it, of course, cannot be questioned that there was a final termination of the prosecution; but that case cannot be binding authority for the proposition that nothing short of a final acquittal constitutes such determination of the proceedings as will support an action for malicious prosecution.

In *Morgan v. Hughes*, *Durnf. & East's Rep.*, vol. 2, p. 225, Justice Buller says: "Saying that the plaintiff was discharged is not sufficient; it is not equal to the word 'acquitted,' which has a definite meaning. Where the word 'acquitted' is used, it must be understood in the legal sense, namely, by a jury on the trial. But there are various ways by which a man may

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be discharged from his imprisonment, without putting an end to the suit. If, indeed, it had been alleged that he was discharged by the grand jury's not finding the bill, that would have shown a legal end to the prosecution."

Of course, if in *Morgan v. Hughes*, it had been averred that the plaintiff was acquitted, it would have been sufficient, as in *Scott & Boyd v. Shelor, supra*; but it was held that "discharged" was not a sufficient averment in a declaration that the prosecution had terminated. If it had been alleged that he was discharged by the grand jury not finding a bill, that would have been a legal end to the prosecution and would, therefore, have been sufficient averment of the legal termination of the particular proceeding against the plaintiff to have warranted the institution by him of his suit for malicious prosecution.

In the note to *Ross v. Hixon* (Kan.), 26 Am. St. Rep. 123, by Freeman, it is said, that "the prosecution on which the action is based must have terminated without resulting in the conviction of the plaintiff. It is sometimes said that it must have terminated in his acquittal, but this is not true. A trial on the merits or otherwise is not essential. It is sufficient that the prosecution has ended so that it cannot be reinstated nor further maintained without commencing a new proceeding, but it must have terminated in some of the several modes in which it is possible for a criminal proceeding to reach a stage beyond which the accused cannot be further prosecuted therein." Citing *Casebeer v. Drahoble*, 13 Neb. 465, 14 N. W. 397; *McWilliams v. Hoban*, 42 Md. 56; *Blalock v. Randall*, 76 Ill. 224; *Gillespie v. Hudson*, 11 Kan. 163; *Schippel v. Norton*, 38 Kan. 567, 16 Pac. 804. Further discussing the question, he speaks of a discharge by a committing magistrate, and says that "if the examining magistrate finds that there is not sufficient cause to hold the accused to answer, and therefore discharges him, that prosecution is thereby ended; and the consideration that other prosecutions may be brought against the same person on the same charge, and that the grand jury, on

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its presentation to them, may find an indictment thereon, cannot prevent the action of the magistrate from having its effect as a termination of the prosecution before him, sufficient to support the civil action." And so with the failure of a grand jury to find an indictment.

With respect to the entry of a *nolle prosequi*, he says, that "if some action or proceeding on the part of the court, or otherwise, is required to make an entry of *nolle prosequi* operative as a final termination of a prosecution, then of course such action or proceeding must supplement such entry; but when it is manifest that the prosecution is at an end, and cannot be revived, it is not material how it came to its end, and the right of the party injured by it to seek redress is complete."

And, speaking generally as to other means of terminating a prosecution, this learned author says: "The only reasonable ground for denying that the termination of a prosecution by the entry of a *nolle prosequi* will support an action for malicious prosecution was, that there had been no trial on the merits, and therefore no acquittal of the accused; but it is settled, as we think, beyond dissent that a trial on the merits is not essential. To hold it essential would be to permit a prosecutor to do all the damage which a malicious prosecution can possibly effect, and then deny the accused the opportunity to vindicate himself by a trial, by having the proceeding quashed or dismissed, and thus escaping all liability for the wrong unlawfully inflicted. Therefore, any mode by which a prosecution may be dismissed or ended, though without a trial, is sufficient. The indictment may be insufficient, and for that reason may be quashed before trial, or upon trial may require the jury to return a verdict of acquittal. In either event, if the accused is discharged by the court, the prosecution is finally terminated in the sense that an action for malicious prosecution may be instituted and sustained, though there is nothing to prevent the finding of another indictment sufficient in form."

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This statement of the law by Mr. Freeman is sustained by a great array of authority, which we deem it needless to discuss or cite.

At sections 248 and 249 of Bishop on Non-Contract Law, it is said, that "if on motion of the State's attorney, a criminal cause is stricken from the docket, with leave to reinstate it, the defendant is not discharged from the indictment, and a suit for malicious prosecution will be premature." But a *nolle prosequi* ends the indictment past recall, and thereupon the right to a malicious prosecution suit is perfected—a proposition from which a few of our courts, misapprehending the effect of a *nolle prosequi*, have dissented, making distinctions not necessary to be particularly pointed out here.

"The methods of ending the proceeding are numerous, and they need not be all specified. It is sufficient, for example, if the indictment is quashed and the prisoner discharged by judgment of the court. Only the particular proceeding need be at an end, it being immaterial that the party is subject to a new one. A criminal prosecution, said a learned judge, is 'terminated, (1) where there is a verdict of not guilty; (2) where the grand jury ignore a bill; (3) where a *nolle prosequi* is entered; and (4) where the accused has been discharged from bail or imprisonment.' Therefore the court held that a prosecution was not ended while pending before the grand jury. A discharge by the examining magistrate will suffice. In the nature of some proceedings the defendant has nothing to do, and whenever the plaintiff's steps are finished, the right to the malicious prosecution suit is complete; 'as,' it was judically observed, 'where the plaintiff was committed on articles of peace for a definite term unless he should find sureties for the peace. In such a case the plaintiff is allowed, *ex necessitate rei*, to maintain his action, though he was discharged by the effluxion of the time for which he was committed, for the reason that he is not at liberty to controvert the statement of the defendants in making

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the complaint, and therefore could not have a hearing and obtain a favorable decision.' A release on giving surety to keep the peace is a sufficient ending of the proceeding."

To the same effect is *Cooley on Torts* (2 Ed.), at p. 215. "The termination of the proceeding must, in general, be by a final acquittal. It is not enough that the parties in a case which they might lawfully settle, have effected a compromise, and thereby terminated it, or that the defendant was discharged because the offense was misnamed in the papers, or because of formal defects. But if the proceeding is *ex parte* to hold to bail, and the accused party has no opportunity to disprove the case made against him, he may maintain the suit, notwithstanding he was required to give bail; and so he may, if on a preliminary examination before a magistrate on charge of crime he is discharged. Whether the entry of a *nolle prosequi* by the prosecuting officer is a sufficient discharge has been made a question. In some cases it has been held that it was; but other cases hold the contrary. The reason assigned in these last cases is that the finding of the grand jury is some evidence of probable cause, and another indictment may be found on the same complaint. *But the reasonable rule seems to be, that the technical prerequisite is only that the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one.*"

It would be easy, but we think unnecessary, to cite very many adjudicated cases in support of the views of the eminent textwriters from whom we have quoted. We shall content ourselves with adding to the authorities adduced the statement of the law as given in 19 Am. & Eng. Encyc. of Law, p. 681, "that a prosecution may be regarded as terminated when it has been disposed of in such a manner that it cannot be revived, so that the prosecutor, if he intends to proceed further, must institute proceedings *de novo*."

The judgment of the Circuit Court is reversed.

Reversed.

Syllabus.

Staunton.

ROBERSON v. WAMPLER, GUARDIAN & OTHERS.

September 14, 1905.

1. **DEEDS—Construction—Technical Words—Intention Otherwise Manifest.**—While technical words are presumed to have been used technically, and words of a definite legal significance are to be understood as used in their definite legal sense, yet if other expressions are used in the instrument in conjunction with such technical words which plainly indicate an intention not in accord with such technical signification, the intention will control the legal operation of the words.
2. **DEEDS—Construction—"Heirs" May Mean Children—Case in Judgment.**—Where, from the language of a conveyance to the "heirs" of a living person, and the circumstances surrounding its execution, it appears that the grantor, in using the word "heirs," meant children, it will be so construed, although the word "heirs" is a technical word, having a definite legal signification, and, when unexplained and uncontrolled by the context, would be controlled by its strict and legal import. In the case in judgment the grant was to the heirs of a living person, describing their place of residence, and was made in consideration of natural love and affection, and required the grantees to support and maintain the grantor and his wife during life and contained other evidence that the word heirs was intended to mean children.
3. **DEEDS—Construction—Intention.**—In deeds as well as in wills the intention of the maker of the instrument, as gathered from all of its parts, must prevail, unless that intention is contrary to law.
4. **DEEDS—Support of Grantor—Excessive Payments by one Grantee—Contribution—Parties.**—Where separate deeds are made to several grantees, each in consideration of the support of the grantor and his wife, one of them who has not done more for the support of the grantor and his wife than his deed required of him has no right to implead the others for a failure to comply with the terms of their conveyances as to such support. And even where such a suit is proper, after the death of the grantor leaving his widow surviving, the widow and personal representatives of the grantor are necessary parties.

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Appeal from a decree in chancery of the Circuit Court of Wise county in the suit of *Wampler, Guardian, v. Smith*. The bill was filed to enjoin the defendant from cutting and removing timber from a tract of land in the bill mentioned, which was claimed as the land of complainant's ward. Into this suit came the appellants by petition, and claimed an interest in the said tract of land, and asked to be made parties, and to have their rights protected. The claim asserted by the petitioners rendered it necessary for the court to construe the deed copied in the opinion. At the hearing, the petition aforesaid was dismissed, and from this decree petitioners appealed.

Affirmed.

Ayers & Fulton, for the appellants.

Bond & Bruce, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

The principal question involved in this case is whether the word "heirs," as used in the deed under which the parties to this controversy claim, was employed in its technical sense, or as meaning "children." The language of the deed, omitting the description of the land conveyed, is as follows:

"This deed made this April 25, 1902, between James Robertson and Nancy, his wife, of the county of Wise and State of Virginia, of the first part, & John B. F. Robertson heirs, of the county of Letcher and State of Ky., of the second part.

"Witnesseth: That for and in consideration of the natural love and affection they have for their sd. son & especially for his heirs & for the further consideration of the *preformance* of the agreement *herfb* to be written on their part, doth grant, bargain and sell unto the heirs of the sd. John B. F. Roberson, a certain tract or parcel of land, lying & being in the county aforesaid on the waters of Pound river. . . .

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"To have and to hold the said heirs of John B. F. Roberson forever, and it is also agreed and becomes a part of this contract that the said heirs of John B. F. Roberson shall take it is also agreed the said heirs of John B. F. Roberson is furnish timber to keep up the line fence so far as it binds on the other heirs of James Roberson care of or cause to be taken care of said James Roberson and Nancy, his wife, for and during their natural lives by furnishing them with food and raiment, washing and bedding such as will be fit and becoming to persons of this age and as the customs of the country, and for the performance of the said service the said grantors doth hereby retain a lien on the said premises, and the said James Roberson and *Nany*, his wife, for themselves and their heirs doth covenant with the said heirs of John B. F. Roberson that they will warrant generally the premises hereby conveyed."

At the time of the execution of the deed John B. F. Roberson was living.

It is a well settled rule of construction that technical words are presumed to be used technically unless the contrary appears upon the face of the instrument, and that words of a definite legal signification are to be understood as used in their definite legal sense. *Nye v. Lovitt*, 92 Va. 710, 713-14, 24 S. E. 345, and authorities cited; *Warring v. Warring*, 96 Va. 641, 32 S. E. 150; *Britt v. Donaghee*, 101 Va. 786, 788, 45 S. E. 324. But where other expressions are used in conjunction with such technical words which plainly indicate what the intention was, and that such intention was not in accordance with the technical signification, the intention will control the legal operation of the words. 2 Minor's Inst., 1114-15 (1st Ed.); 1 Jarman on Wills, 61, and note (Bigelow's Ed.); *Wooten v. Redd*, 12 Gratt. 196, note to Michie's Ed. citing cases; *Tibbs v. Dural*, 17 Gratt. 349.

The word "heirs" is a technical word having a definite legal signification, and, when unexplained and uncontrolled by the context, must be interpreted according to its strict and technical

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import, and in this sense it designates the person or persons appointed by law to succeed to the real estate in cases of intestacy. But where, from the language of the instrument and the circumstances surrounding its execution, it appears that the maker in using the word "heirs" meant children, it will be so construed. This it is conceded is so as to wills, but it is insisted that a different rule prevails as to deeds, and cases are cited to sustain the contention that a deed made to the "heirs" of a living person is void, although words are used in conjunction therewith which show that the word was not used in its technical sense, but as meaning children. *Hall v. Leonard*, 1 Pick. 27; *Hileman v. Bouslaugh* (Penn.), 53 Am. Dec. 478; *Morris v. Stephens*, 46 Penn. 400; *Winslow v. Winslow*, 56 Ind. 8.

Whatever may have been the rule of decision in the earlier cases of the States of Massachusetts, Pennsylvania and Indiana, the later decisions seem to have modified the rule—the weight of authority and the better reason is in favor of the rule that in deeds as well as in wills the intention of the maker of the instrument, as gathered from all its parts, must prevail.

In *Heath v. Hewitt*, 127 N. Y. 166, 27 N. E. 959, 13 L. R. A. 46, 24 Am. St. Rep. 438, where by statute the courts are required to give effect to the intention of the maker in constructing deeds as well as wills, it was held that where from the language of the deed and the circumstances surrounding its execution it appears that the grantor in using the word "heirs" meant children, it will be so construed, and effect thus given to the instrument, notwithstanding the general rule that a conveyance to the heirs of a living person is void for uncertainty. In this respect the court declared there was no difference between wills and deeds. *Seymour v. Bowles* (Ill.), 50 N. E. 122. See 13 Cyc. 660, note 87 citing cases.

No decision of this court has been cited by counsel, nor have we found one in our investigation, in which the precise question involved in this case was raised and decided. But the rule of construction in this State, independent of statute, is that in deeds as well as in wills the intention of the parties must prevail, unless that intention is contrary to law.

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In the early case of *Hawkins v. Berkley*, 1 Wash. 204, 206, it was said that agreements are always to be construed according to the evident intent of the parties appearing from the deed itself without a rigid adherence to the letter." And this reasonable and just rule has ever since been recognized as the correct rule for interpreting written instruments. 2 Minor's Inst., 1113-1116 (1st Ed.); *Stace v. Bumgardner*, 89 Va. 420, 16 S. E. 252; *Temple v. Wright*, 94 Va. 338, 340, 26 S. E. 844; *Lindsay v. Eckels*, 99 Va. 668, 671, 40 S. E. 23; *White v. Sayers*, 101 Va. 821, 828, 45 S. E. 747.

In the case of *Stace v. Bumgardner*, *supra*, it was said by Judge Lewis, in delivering the opinion of the court, where it was insisted that a different rule applied in the construction of wills from that which prevailed as to deeds and other contracts, that "there is, however, no material difference in principle, in the rules of interpretation, between wills and contracts, except what naturally arises from the different circumstances of the parties. No technical language is necessary to create a trust either by deed or will, and in both classes of cases the object of the judicial expositor is the same, namely, to discover *the intention* which is to be gathered in every case from the general purpose and scope of the instrument in the light of surrounding circumstances."

Applying the foregoing rules of construction to the deed under consideration, it is reasonably certain that the word "heirs" was not used technically but as synonymous with children, a sense in which it is frequently used in common language, especially by unlettered people as the scrivener in this case evidently was.

It appears from the record that on the same day the deed under consideration was made the grantor executed two other conveyances, and a few days afterward another, by which he partitioned and conveyed his real estate to three of his children and the heirs of his other child, in consideration of natural love and affection, with a requirement that the grantees in the deed

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should support and maintain the grantor and his wife during their natural lives. A consideration of natural love and affection for the grantees in the deed implies that they were living persons for whom he cherished affection, and not persons unknown or perhaps not in being as the grantees might be if the word "heirs" was used in its technical sense. *Fountain Coal Co. v. Beckleheimer*, 102 Ind. 82, 1 N. E. 202, 52 Am. Rep. 645. Again, the provision in the deeds that the grantees should care for, support, and maintain the grantor and wife, or cause that to be done, necessarily implies that they were living persons since the deeds took effect upon their delivery, and the duty to support and maintain at once commenced.

The grantees in the deed in question are described as being "of the county of Letcher, and State of Kentucky," where John B. F. Roberson resided, again indicating that the word heirs was used in the sense of children, and not in its technical sense since the grantor could not know who would be the possible heirs of John B. F. Roberson.

The deed further provides that the grantees shall "furnish timber, and keep up the line fence so far as it binds on the other heirs of James Roberson" (the grantor). There can be no question that the grantor used the word "heirs" in this connection in the sense of children, for he himself was then living, and had no heirs.

In the other deeds made on the same day to his daughters, the grantor makes use of the same expression again, unmistakably indicating that the word was not used in its technical sense.

Construing the deed as a whole, we are satisfied that the manifest intention of the grantor was to convey the property to John B. F. Roberson's children, and not to his heirs in the technical sense of that word, and that the Circuit Court did not err in so holding.

The appellants assign as error the action of the Circuit Court

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in failing to provide in its final decree that the person to whom the tract of land in controversy belonged should contribute his proportion of the maintenance and support of the grantors in said deed.

This assignment of error is, we think, without merit. The pleadings in the case do not properly put that question in issue. Unless the appellants had done more for the support and maintenance of the grantor and his wife than their conveyance required them to do, they had no right to implead the appellee's ward for a failure to comply with the terms of the conveyance to her as to such support and maintenance. Again, the necessary parties were not before the court. The grantor in the deed was dead, and neither his personal representative nor his widow, the principal parties interested in that controversy, was a party to the suit.

The decree appealed from must be affirmed.

Affirmed.

Syllabus.

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DIXON v. PADDOCK.

September 14, 1905.

1. **PARTNERSHIP—Dissolution—Settling Partner—Fiduciary Relation—Fraud.**—The active partner in winding up and settling the affairs of a dissolved firm who, for liberal compensation, has assumed the duty of realizing the best price obtainable for firm property occupies such a relation of trust and confidence toward his confiding partner that he must show beyond all reasonable doubt the fairness and honesty of his transactions with such partner relative to the firm assets. He cannot buy from his confiding partner at a reduced price his interest in firm property, upon which he has given an option, or which he has sold or contracted to sell to another at a much larger sum, without first making to him a full disclosure of the facts. Nor are the rights of the parties in any way affected by the fact that he agreed with the proposed purchaser to observe secrecy as to the contract.
2. **PARTNERSHIP—Dissolution—Accounting—Case in Judgment.**—A partner who has purchased an engine and rented it to the firm at a fixed rent per month cannot, upon dissolution, charge the engine to the firm at an advance price over costs. Upon the evidence in this cause, the engine should be charged to the firm at cost, and the partner who received the rent should be made to account to his co-partner for one-half thereof.
3. **PARTNERSHIP—Accounting—Private Expense of One Partner.**—A partner who conducts a private and competing business of his own through the general offices of the firm, is rightly accountable for an equitable proportion of the expenses of such offices. He cannot, as settling partner of the dissolved firm, charge the whole of such expenses to the firm.
4. **EQUITY—Commissioner's Report—Questions of Fact.**—This court will not disturb the finding of a commissioner on items of accounting between partners on pure questions of fact, where it appears that the commissioner has made a careful and painstaking investigation of every item of dispute, and his findings are well justified by the evidence.

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Appeal from a decree in chancery of the Circuit Court of Wise county. Decree in favor of complainant. Defendant appeals.

Affirmed.

The opinion states the case.

E. S. Finney, for the appellant.

O. M. Vicars and Ayers & Fulton, for the appellee.

HARRISON, J., delivered the opinion of the court.

By agreement in writing, dated April 1, 1899, John T. Dixon, the appellant, and F. S. Paddock, the appellee, formed a partnership under the firm name of "Dixon-Paddock Lumber Company," for the purpose of conducting a general lumber business, and, in connection therewith, acquiring the stock of the Gladeville Railroad Company, and equipping and operating the same.

The railroad mentioned was acquired, the purposes of the partnership carried out, and its business conducted until October 31, 1900, at which time, by an agreement in writing between the parties, the firm was dissolved. Under this agreement all of the partnership assets, with the exception of certain property then sold to the appellee, passed into the hands of the appellant, to be disposed of by him with a view to his settling up the business of the concern as expeditiously as possible; it being therein agreed that appellant should have until July 1, 1901, to close up the partnership business and make a settlement with appellee of all firm matters, except the Gladeville Railroad, provided that property should then remain unsold, it not being known at the time whether a satisfactory sale of the railroad could be made by July 1, 1901.

The dissolution contract of October 31, 1900, provided, among other things, that nothing contained therein should be

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construed as in any manner impairing the rights and obligations of the parties under the partnership agreement of April 1, 1899, and that a settlement of the partnership business should be subject to that agreement.

In response to a proposition from appellant that he would take the Gladeville Railroad and equipment at the price of \$18,000, appellee replied on June 13, 1901, in part, as follows: "If you will make me up a clear statement of the affairs of the Dixon-Paddock Lumber Co. and the Gladeville Railroad, together with an itemized statement of your account and my account; an itemized statement of the losses sustained by us, and an approximate statement of the amount, value, and location of the lumber on hand, I will name you a price that I would be willing to take provided you and Gen. Ayers do not trade."

In answer to this request for a statement, appellant wrote appellee June 15, 1901, in part, as follows: "Regarding making up a statement of the affairs of the Dixon-Paddock Lumber Co., am not in a position at this time to give you such a statement as you indicate. I, of course, expect to make up a statement the first of July as per our contract, which I prefer to do then instead of now." On the 9th of July, 1901, appellant furnished appellee with a statement of the partnership business. This statement was accepted by the appellee as an honest disclosure by the appellant of the affairs of the partnership which were in his hands to be wound up, and formed the basis of a settlement then made between the parties, and by which the appellee sold out his interest in the assets of the concern to the appellant.

The bills, original and amended, in this cause were filed by the appellee, alleging that he, relying upon the honesty and integrity of appellant, and believing that the statement or balance sheet mentioned was a true statement of the affairs of the partnership business, had sold his interest in the partnership assets to the appellant upon the basis of such statement. The bills

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further charge that the complainant had subsequently discovered that the statement rendered by appellant, which formed the basis of their settlement, was not true, but that appellant had wrongfully and fraudulently concealed a number of important matters from appellee which should have entered into the settlement, and which would have produced a wholly different result greatly to the advantage of complainant. The prayer of these bills is that the sale made by complainant of his interest in the partnership assets to the appellant be declared to be fraudulent and void; that appellant be required to render a true and correct account of his dealings with the partnership assets, and that he be required to pay the complainant what shall appear to be justly due him upon a fair settlement of such accounts.

The allegations of these bills are denied by the answers thereto filed by the appellant.

The largest item of the statement rendered by appellant of his transaction with the partnership assets, which formed the basis of the sale by appellee, was a credit of \$18,000, as the value of the Gladeville Railroad, which was to pass to the appellant as part of his purchase from the appellee. Before this sale of July 9, 1901, indeed at the time the letter of June 15, 1901, already mentioned, was written, appellant had entered into a contract in writing, in the name of the Dixon-Paddock Lumber Company, as party of the first part, agreeing to sell to George E. Manning, trustee, this railroad property at the net price of \$33,000, and had received from Manning \$1,000 in cash, on account of the purchase money, appropriating the same to his individual use. In October, \$16,000, of this purchase money had been paid, and by the following January, \$28,500 had been paid. No mention was made by appellant of the existence of this contract at the time he rendered the statement which formed the basis of his purchase of the half interest of appellee in this railroad property at \$9,000.

As a general rule, he who alleges fraud must distinctly prove it. *Engleby v. Harvey*, 93 Va. 440, 25 S. E. 225. But it is

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equally true that where a fiduciary or confidential relation exists between the parties to a transaction, the party who occupies the position of active confidence must show beyond all reasonable doubt the fairness and honesty of the transaction. Kerr on Fraud and Mistake, vol. 1, p. 386.

That the appellant occupied a relation of trust and confidence to the appellee with respect to the matter here inquired of, is fully established by the evidence. As the active partner in winding up and settling the affairs of the dissolved company, he had assumed the duty, no less obligatory than a fiduciary trust, of realizing from the common assets the best price obtainable for the benefit of himself and his confiding partner, and for this work he was allowed by the dissolution contract liberal compensation.

Appellant admits that he concealed from the appellee the contract he had with Manning, trustee, and undertakes to excuse his action in the matter upon the ground that it was an option contract and therefore without binding force, and that he had agreed with Manning that he would not disclose the fact that he held the option.

It is unnecessary to consider whether this Manning contract was an option, or a conditional sale. So far as the rights of the appellee are concerned, it is wholly immaterial whether the sale to Manning, trustee, was an option or an absolute sale, for in either event appellee was entitled to an equal interest with appellant in all benefits that were likely to accrue from the transaction. Nor is it a matter at all affecting the rights of appellees in the premises that appellant agreed with Manning, trustee, that he would observe secrecy as to the contract. No such agreement is to be found in the written memorandum between the parties, and if it were true that an oral understanding to that effect was had, it would be void as to appellee who was entitled to a full disclosure from appellant of all matters pertaining to their partnership interests. The concealment by the appellant of the Manning contract under which

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he had then received \$1,000 cash, and was to receive in addition thereto \$32,000, and the purchase, under such circumstances, of the half interest of his partner in the railroad property at \$9,000, was a fraud upon the appellee, and the appellant has been properly held liable to make good the loss thereby sustained.

We are further of opinion that there was no error in requiring appellant to account to appellee for the item of \$746.18, growing out of his fraudulent misrepresentation with respect to the "Engine and Caboose."

It appears that appellant bought this engine and caboose for \$2,350, for use on the Gladeville Railroad, and rented it to the partnership, as his private property, at \$80.00 per month. In the statement rendered appellee as the basis of their settlement, appellant charges up this engine and caboose as a liability of the firm at \$2,500, and requires his partner, who was ignorant of the facts, to account for it upon that basis, notwithstanding the fact that he had received from the firm \$1,540 on account of rents for its use. The commissioner treated the engine and caboose as a liability of the partnership at \$2,350, its actual cost, and required the appellant to refund to appellee his one-half interest in the rents which had been fraudulently appropriated by the appellant to himself. This was so manifestly proper that comment is unnecessary. The record discloses no justification for the course of appellant in treating this engine, etc., as an asset and liability of the partnership in the statement furnished by him to the appellee, and at the same time charging the firm with \$1,540, for the use of it as his private property during the short time it was used by the firm.

We are further of opinion that there was no error in holding appellant liable to appellee for \$938.63, on account of office expenses improperly charged by appellant to the Dixon-Paddock Lumber Co.

It appears that the general offices of the company were located at Ronceverte, West Virginia, and, as contemplated by the terms of the partnership, were under the control and manage-

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ment of appellant. Soon after the formation of the partnership appellee, whose special duty it was to look after the outside work of the company, moved with his family to Wise county, Va., where he might be conveniently located with respect to the active operations of the company. It further appears that appellant conducted a private and competing business of his own, all of which was transacted through the general offices of the Dixon-Paddock Lumber Company. This private enterprise amounted in volume to two-thirds of the business of the office, while that of the partnership was only one-third. Notwithstanding appellant was appropriating to his private purposes two-thirds of the benefit of these offices, he charged the Dixon-Paddock Lumber Company with, practically, the entire cost of salaries and all other office expenses.

The contested item now under consideration grows out of the action of the commissioner in attempting to correct this injustice by requiring appellant to account for an equitable proportion of these expenses.

The finding of the commissioner in this matter has done no injustice to appellant, and the exception thereto was properly overruled.

Appellant contends that the court erred in confirming the report of Commissioner Peary charging him with several other minor items, and the appellee assigns several cross-errors involving the correctness of various findings of the commissioner. These several disputed items involved matters of accounting and questions of fact merely. There is no occasion to enter upon a detailed statement of the history of such items. An able commissioner has filed an unusually clear and satisfactory report, involving a careful and painstaking investigation of every item now in dispute; and a laborious consideration of the mass of evidence accompanying that report shows that the commissioner was well justified and fully sustained in his findings. It is clear that no error was committed to the prejudice of appellant, whose conduct in this matter was not such as to commend him to a court of equity.

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Upon the whole case, the decrees complained of must be affirmed.

Affirmed.

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Staunton.**SPENCER & ANOTHER v. FLANARY, ADM'R., & OTHERS.**

September 14, 1905.

1. **LIMITATION OF ACTIONS—Executions—Death of Defendant—Revival.**—Upon a judgment obtained against a living person no execution can issue after his death, and the right to revive by *scire facias* against his personal representative, or to maintain an action thereon, is barred by the statute of limitations at the end of five years after the qualification of his personal representative. If a lien is acquired on a debtor's choses in action by reason of a *feri facias* issued on the judgment against the defendant in his life-time, it is lost unless the judgment be revived as aforesaid or some action be instituted for its enforcement within five years from the qualification of his personal representative.

Appeal from a decree in chancery of the Circuit Court of Lee county, in a suit brought by appellants for the purpose of subjecting to the alleged lien of a *fi. fa.* against Chadwell Brittain in his lifetime the proceeds of a claim against the United States Government which had come into the hands of his administrator since his death. The bill was dismissed, and complainants appeal.

Affirmed.

The opinion states the case.

Orr & Noell, for the appellants.

Duncan & Cridlin, for the appellee.

HARRISON, J., delivered the opinion of the court.

The judgment sought to be collected in this proceeding was

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rendered March 30, 1877, against Chadwell Brittain. Two executions were issued thereon, and each of them was returned "no property found," the date of the last execution being April 30, 1886, and returnable to the following July rules. In 1893 the judgment debtor, Chadwell Brittain, died, and in November of that year his estate was committed to C. E. Flanary for administration.

Brittain had begun in his lifetime the prosecution of a claim against the United States Government for property taken by the Federal army during the late war between the States. The prosecution of this claim terminated successfully in March, 1905, and the bill in this case was filed to the April rules, 1905, seeking to enforce the judgment and execution against Brittain, as a preferred lien upon the claim which had been allowed by Congress, the proceeds of which were then in the hands of his administrator.

No revival of this judgment, either by *scire facias* or action was ever had against the administrator of Chadwell Brittain.

A demurrer was filed to the bill, and a plea of the statute of limitations interposed by the administrator. The Circuit Court rested its decision upon the defense of the statute of limitations, and dismissed the bill.

There can be little doubt of the correctness of this conclusion when the law, as we understand it, is applied to the facts stated. There are two sections of the Code which bear upon and provide periods of limitation to actions against *personal representatives*. The first is section 2920, which is the general statute of limitations of all personal actions, except a judgment or recognizance, and, after enumerating the several periods of limitation of such actions, the section concludes:

"Provided, that the right of action, against the estate of any person hereafter dying, on any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than five years from the quali-

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fication of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued." See *Kesterson v. Hill*, 101 Va. 739, 45 S. E. 288.

The other section to which we have reference, providing a period of limitation to actions against personal representatives, is 3577 of the Code. As already seen, section 2920 does not provide a period of limitations in the case of judgments; but the law governing and directly applicable to such cases is found in section 3577, which is no less explicit with respect to judgments than are the provisions of section 2920 with respect to other claims.

Section 3577 provides as follows: "*On a judgment, execution may be issued within a year, and a 'scire facias' or an action may be brought within ten years after the date of the judgment; and where execution issues within the year, other executions may be issued, or a 'scire facias' or an action may be brought within ten years from the return day of an execution on which there is no return by an officer, or within twenty years from the return day of an execution on which there is such return; except that when the 'scire facias' or action is against the personal representative of a decedent, it shall be brought within five years from the qualification of such representative.*"

The language of this statute is too clear to call for interpretation or construction. The provision is express and emphatic that where the *scire facias* or action on a judgment is against the *personal representative* of a decedent, the proceeding must be taken within five years from the qualification of such *personal representative*. More than eleven years elapsed after the qualification of Chadwell Brittain's administrator before the present suit to enforce the judgment was instituted, and in the mean time the judgment had not been revived, or any other action taken thereon.

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At common law there was no limitation upon the right to enforce a judgment, but the statute, in effect, as it now stands, has been in force for many years. The only practical difference between the law as it stood in the first revised Code of 1819, and the statute now in force is, that, in addition to the limitation imposed by the former, which went only to judgments where execution had not issued, the present statute imposes a limitation as to the writ of *scire facias* or *action*, although execution has issued. 1 Rev. Code, 1819, Ch. 128, secs. 5 & 17. Code, 1887, sec. 3577.

As early as the year 1823 the present contention was made before this court, and it was held, under practically the same statute, that "a judgment obtained against a testator in his lifetime, and not revived against his personal representative after his death, within five years from the time of his qualification, is barred by the statute of limitations."

This decision has stood without challenge for more than eighty years, and if authority were needed it would be all that was necessary in support of the proposition that the judgment asserted in this case is barred by the statute of limitations. *Peyton's Admr. v. Carr's Exor.*, 1 Rand. 436; 1 Barton's Law Pr., 104.

It is contended that, by virtue of section 3601 of the Code, a lien was created upon the claim of Chadwell Brittain against the government, which the appellant has the right to enforce.

Without passing upon the question, whether or not a lien was created upon a mere claim for property taken by the Federal army during the war, but conceding, for the sake of argument, that such a lien was created, like all other liens it was capable of being lost, and in this instance was lost by reason of the failure to revive or take other action upon the judgment against the administrator within five years from his qualification.

The next section, 3602, to that relied on, furnishes a complete answer to this contention. It provides that the lien acquired under section 3601, "*shall cease whenever the right of*

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the judgment creditor to enforce the judgment by execution, 'scire facias' or action ceases," showing a care on the part of the Legislature not to impinge upon the limitations it had placed upon actions against personal representatives. The right to enforce the judgment by execution ceased at the death of Chadwell Brittain; the right of *scire facias* or action ceased at the end of five years after the qualification of his administrator.

It is true there is a line of cases, following *Taylor v. Spindle*, 2 Gratt. 44, which hold that it is not necessary to revive a judgment before filing a bill in chancery to enforce the lien of such judgment upon real estate, but these cases have no bearing upon the question of whether the judgment is barred. That is determined by the application of the statute, whenever any proceeding is taken to enforce it.

Whatever may have been the life of a judgment had the debtor lived, before it was barred by the statute of limitations, it cannot be enforced after his death unless the proceedings contemplated by the statute are taken against his personal representative within five years from the date of the qualification of such representative. The Legislature manifestly had in view, not only the protection of the estates of deceased persons against stale demands, but also a wise purpose to facilitate the settling and winding up of such estate within a reasonable time. The wisdom of such laws is apparent, and if we had the power we would have no disposition to circumscribe their scope or impair in any degree their operation.

For these reasons the decree appealed from must be affirmed.

Affirmed.

Staunton.

WISE TERMINAL COMPANY V. McCORMICK.

September 14, 1905.

1. **NEGLIGENCE—Case at Bar—Contributory Negligence.**—The evidence in this case wholly fails to show actionable negligence on the part of the defendant, and hence the plaintiff was not entitled to recover. The plaintiff, an employee of the defendant, while off duty, at an unexpected time and place, stepped into the middle of the defendant's railroad track in front of a slowly moving engine and tender, which were backing, and attempted to get on the step or foot-board on the rear of the tender, upon which was placed an oil can, and fell under the tender and was injured. The engine and tender were properly equipped and managed for the work required, and the engineer used due diligence to stop the train as soon as the plaintiff's peril was discovered. It was not reasonably necessary or proper for the plaintiff to take the risk he took in order to accomplish the purpose he had in mind in attempting to board the tender.
2. **NEGLIGENCE—When Not Imputed.**—Negligence cannot be imputed to one unless he has done something which he knew or had reason to believe might cause injury to another.
3. **EVIDENCE—Experts—Speed of Train.**—Expert testimony as to the speed at which a train was running, or the distance within which it might have been stopped, will not be received unless based upon the operation of cars or engines of similar construction and equipment, and under like circumstances.
4. **MASTER AND SERVANT—Two Modes of Doing Work—One Safe, Another Dangerous.**—Where an employee is confronted with two methods of doing work, the one safe and the other dangerous, he owes a positive duty to his employer to pursue the safe method irrespective of the degree of danger involved in the unsafe method, and any departure from the path of safety will prevent his recovery, if injured.
5. **NEGLIGENCE PRODUCING EMERGENCY.**—One who, by his own negligence, has placed another in an emergency, cannot require of that other the wisest possible action in order to save him from the consequences of his own fault.

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6. *NEGLIGENCE—Contributory Negligence—Case at Bar.*—Upon the evidence in this case, if the negligence of the defendant's servant be conceded, it clearly appears that the plaintiff's right of recovery is barred by his concurring negligence at the time the injury complained of was inflicted.

Error to a judgment of the Circuit Court of Wise county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Ayers & Fulton and *Bullitt & Kelly*, for the plaintiff in error.

William H. Werth, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

The defendant in error, W. B. McCormick, brought this action and recovered in the Circuit Court of Wise county, a verdict and judgment against the plaintiff in error, Wise Terminal Company, which was the defendant in the court below, for \$5,000 as damages for personal injuries alleged to have been inflicted upon him by the negligence of the defendant company.

In the view taken by this court, there was a total failure on the part of the plaintiff to trace actionable negligence to the defendant company, and in no aspect of the case was he entitled to a verdict. Therefore, it is unnecessary to notice in detail the numerous assignments of error other than the refusal of the trial court to set aside the verdict on the ground that it was contrary to the law and the evidence.

The Wise Terminal Company, operates a line of railroad about six miles in length, extending from the town of Glamor-

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gan, in Wise county, to the town of Norton, in the same county. The business conducted by the company, at the time of the injuries received by the plaintiff, consisted of two passenger trains between the two points named, one in the morning and the other in the evening, and the carrying of freight between the same points.

In carrying on this business, the defendant company found it necessary to purchase and use only one engine and one passenger car, the freight cars being furnished by connecting roads. The engine used, though second hand, was duly inspected before it was purchased by the defendant company by competent inspectors, and pronounced reasonably safe and suitable for the work required of it. In fact, according to the undisputed evidence in the case, was more desirable, and much safer on the new road-bed which the defendant company was operating than a new engine would have been. The defendant company employed competent men to manage and conduct its business, and among other of its employees was the plaintiff, McCormick, who was a brakeman well versed in railroad rules, who usually performed his duties reasonable well, but had fallen into the habit of drinking ardent spirits to excess at times. His duties were those of an ordinary brakeman, and to keep one of the two keys to the passenger coach from the time he went on duty at seven o'clock A. M., till about 7:30 P. M., when he was to lock the passenger coach and deliver the key to another employee, Taylor, and thereupon his (McCormick's) duties and employment ceased for the day, and it became the duty of Taylor, as the night watchman (or "hostler") to take charge of the engine and passenger coach, and keep them in charge during the night. He, Taylor, was also to clean, oil, sand, water, and coal the engine, clean up the passenger coach, and have them ready for the first passenger run from Glamorgan to Norton the next morning. No one besides Taylor had anything to do with the engine or passenger coach after the last or night passenger run from Norton to Glamorgan was completed; the en-

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gine and passenger coach remaining at Glamorgan for the night in the exclusive custody and control of Taylor, with no reason whatever for him to expect any one to come about them. There was no regular round-house for the protection and care of this one engine, and, in the performance of his duties in cleaning said engine and getting the same ready for duty on the road early next morning, it became necessary to use kerosene oil, and for this purpose there was kept in the passenger coach a five gallon can of such oil, which Taylor, the night watchman, would use and then return to its place in the passenger coach. The road being new and the grounds muddy, it frequently became necessary for the night watchman, in the performance of his duties, to detach the engine and take it to a certain switch in the yard, where, on account of the increased width of the level space at the switch, he could stand the engine and move easily, and with less contact with the mud, get around it, and do the necessary cleaning and other work upon it. After the necessary cleaning and oiling was done, the night watchman would take the engine back down the main track respectively to the places where he could sand, coal, and oil it, and then attach it to the passenger coach, to be followed by sweeping out the passenger coach and otherwise putting it in proper condition for the first passenger run leaving Glamorgan about 7:00 o'clock the next morning; the night watchman remaining in charge until the next morning, when he delivered the engine and coach to the crew which made the runs between Glamorgan and Norton, said crew including the plaintiff, McCormick, who had no duties or business on the engine or coach from about 7:30 o'clock P. M., the previous evening until 7:00 o'clock the next morning. When the night watchman would get his engine clean, and start it back for sand, water and coal, and to be attached to the passenger coach, he would of necessity place the oil can on a certain step affixed to the rear end of the tender of the engine and extending entirely across the tender, which was, according to the evidence, the only place where the oil can could be safely

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placed while carrying it back to its final destination in the passenger coach, and it was the custom to so carry it from the passenger coach to the point where the engine was cleaned and oiled and backed to the passenger coach when the work of cleaning and oiling the engine had been done. Of the two keys to the passenger coach mentioned, the watchman had one, and it was therefore no impediment to him in the discharge of his duties if McCormick (the plaintiff) did not deliver the other key to him when he went off duty until the next morning, hence there was no actual necessity for McCormick, when he went off duty, to give the key he held to the night watchmen, and the only reasons for his doing so were, (1) that he would be observing the rules, and (2) that there would be less risk of some outsider getting hold of the key if given to the night watchman who remained on duty and awake all night. There were no lights on the rear or tender of the engine, and none were necessary as no one was expected or allowed to attempt to get on the engine while it was off duty, and in the charge of the night watchman. As there was but one engine to move on the yard, there was no danger of a collision by reason of the absence of lights, or "markers" on it, and therefore the reason why standard roads with a number of engines and trains constantly moving have these lights or "markers" did not apply. The step that ran across the rear end of the tender and on which the oil can was usually placed, as stated, was a board about nine inches wide, and about one and one-half inches thick, and about seventeen or eighteen inches high from the track, and some eight or nine inches higher than the usual height of such steps. Just why this was so the evidence does not disclose, but it does appear that the danger in attempting to board the engine by getting on said step would be far greater than if it had been of the ordinary height (eight or nine inches), a fact which, by reason of his experience, was well known to McCormick. The engine while in use on the road was not fully equipped with an air brake, though the tender

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was so equipped, and from this the air could be made to operate and control the other parts of the train, and as no great speed was required or attained in the handling of the defendant company's trains, this equipment was all that was necessary, but after the day's work was over even the air brake on the tender was not required nor used, and the air valve was cut off, and the engine controlled in the few movements it made on the yard during the night by the steam brake and reverse lever. This was customary with all roads, and was uniformly followed in the handling of the engine in question on the yard of the defendant company, and there was no real necessity to use air brakes when being so handled is apparent.

On July 6, 1903, the last passenger run from Norton to Glamorgan was made, and the engine, as usual, turned over to the night watchman, Taylor, in its usual condition, *i. e.* with the air valve closed. McCormick, however, for some reason, forgot to turn over to Taylor the key to the passenger coach that was in his possession, and which it was his duty to have delivered to Taylor on the completion of the run about 8:00 o'clock P. M., and which duty McCormick generally performed and had been remiss in doing but a few times before. In his examination in chief in this case he started out to excuse his omission on this occasion by the statement that on arriving at Glamorgan and going off duty for the night he did not see Taylor, but on cross-examination he frankly admits that he simply "forgot" it. He claims that he occupied the time between 8:00 o'clock P. M. and midnight in writing two letters, and in reading a newspaper, when he discovered that he had failed to deliver the key to Taylor as he should have done on arrival of the train and that he then had it in his pocket, and, although there was no necessity for his doing so, so far as enabling Taylor to get into the coach was concerned, he started out in quest of Taylor to deliver to him the key.

Taylor, as usual, had taken the engine up to the switch, above referred to, for the purpose of cleaning and oiling it,

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and McCormick claims that when he came down looking for Taylor to give him the key he went up to the engine and could not discover him there. He does not claim to have called for Taylor but only that he glanced around to see if he was at the engine. After failing to see Taylor on the engine, McCormick went down the track to a point under or near what is known in the record as the "Larry Trestle" and there observing that the engine was rolling towards him, he stopped in the middle of the track for the purpose of boarding the tender (which was in front, as the engine was moving backward) by getting on the step across the same, and when the tender rolled on down he made the attempt to so board the tender, but in doing so, as he claims, his foot struck the oil can which Taylor had placed on the step, and it caused him to fall under the tender and the tender and engine ran over him inflicting such injuries that his right arm and right leg had to be amputated. He claims that when he saw he was falling he commenced hallooing; that he caught with his hands on the end of the tender and was dragged a few feet when his hold broke and the tender and the engine passed over him, the latter passing him a few feet before it stopped, but he does not undertake to state definitely the distance the engine ran after he fell or after the accident, which was quite natural under the circumstances.

The theories upon which the plaintiff grounds his claim to damages, were, (1) that Taylor, the night watchman, was incompetent to perform the duties entrusted to him; (2) that Taylor was negligent in placing the oil can on the step across the front of the tender; (3) that the engine was not suitably equipped with air brakes and was not properly lighted; and (4) that Taylor did not stop the engine as soon as he ought to have done after plaintiff fell under it.

There was practically no effort made in the introduction of the evidence to sustain the allegation of the declaration that the defendant company was negligent in using a second-hand engine, nor as to the incompetency of Taylor, the night watch-

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man. With reference to the placing of the oil can on the step, the lack of lights or air brakes on the engine, there is absolutely no evidence in the record from which to impute to the defendant company any negligence, whatever; therefore, the instructions to the jury, from one to nine inclusive, given for the plaintiff, all of which were, in one form or another, predicated upon the supposed negligence of the defendant company in the respects mentioned, upon familiar principles ought not to have been given.

It is a fundamental principle of negligence, that one charged therewith must have done something which he knew or had reason to believe might cause an injury to some one else, and unless this is proven negligence cannot be imputed.

In addition to plaintiff's own evidence showing conclusively that no one had any business on the step or foot-board across the rear end of the tender after the train came in and the engine was turned over to Taylor, the uncontradicted statement of Taylor is that no one had any business there, so far as he knew, and, therefore, he was not looking for anybody about the engine, or on the track.

At one point it is alleged and argued that the negligence of the defendant company, with respect to the oil can consisted in a violation of a rule against putting such an obstruction on the step of the engine, and at another that the negligence consisted in not having such a rule. Either contention might have been plausibly made if the accident out of which this suit arises had occurred at a time and place when and where there was any reason whatever to expect that any one would attempt to get upon the step or foot-board of the engine in question, but that is not the case here. Moreover the plaintiff himself testifies that he had with him a regular railroad lantern, which he admits afforded him sufficient light to see the small iron hand-hold on the end of the tender, which he got hold of or attempted to get hold of; yet he tries, as it would seem, to leave the impression that the lantern did not afford

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him sufficient light to see the five-gallon oil can on the step, and accepting this as true it but adds to the strength of the proof his evidence affords of his own gross negligence proximately causing the injuries for which he sues, or at least contributing thereto.

It is also shown in the evidence that while the engine is moving to and fro at work on the yard at night colored lights are set back on the tender so that the edge of the tender throws a shadow down immediately around the tender and no light is thrown on the step or foot-board. These lights are only put on the engine as "markers," i. e. for the purpose of indicating to people and trainmen the location of the engine, and not for the purpose of enabling them to get upon the engine. Their absence from the engine on the night of this accident, even if under the circumstances they should have been there, could not by any possibility have contributed to the accident, since the plaintiff himself testifies that he both heard and saw the engine coming towards him. It also clearly appears, there being really no evidence to the contrary, that with the air valve shut off, which was the case, the engine could have been stopped without the air brakes as quickly and within the same distance by reversing and giving the engine steam.

A number of witnesses were permitted to give opinions in answer to hypothetical questions which assumed facts concerning the speed of the engine at the time the plaintiff was injured, and within what distance it could have been stopped after Taylor had notice of the plaintiff's peril, when these facts had not been and never were proved in the case; but we deem it unnecessary to comment on this evidence further than to say, that it was, under the circumstances, irrelevant and incompetent. The speed at which a train was moving or within what distance it could be stopped, are questions of actual fact and expert testimony thereon can, under no circumstances, be

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introduced unless based upon the operation of cars or engines of similar construction and equipment, and under like conditions. *Richmond Pass., &c., Co. v. Rack's admr.*, 101 Va. 487, 44 S. E. 709.

The remaining question in the case is, whether or not Taylor, after he knew or had notice of plaintiff's peril, exercised ordinary care to prevent the injuries to him?

We do not attach any importance to the question, whether the plaintiff was upon the track of the defendant company on the night of his accident as an employee, or a stranger, or a trespasser. Conceding that it was his duty, as is so earnestly contended, to deliver the key to Taylor when he found it in his pocket several hours after he should have so delivered it, and that he was properly on the yard of the defendant company for that purpose as an employee, the question remains whether there was reasonable and proper cause for him to step in the middle of the track to await the approach of the engine to him, and then attempt to mount the step across the front of the tender from the middle of the track without sufficient light to enable him safely to do so, as he insists.

It was neither reasonably necessary or proper for him to take this risk in the performance of the duty resting upon him to deliver the key to Taylor. *Thomp. on L. of Neg.*, secs. 3748, 3749, 4988; *Bertha Zinc Wks. v. Martin*, 93 Va. 791, 22 S. E. 869. He admits that if he had safely gotten upon the step he could not have delivered the key from there to Taylor, who was in the cab of the engine, but would have had to ride on the step down to where the engine was to stop at the coach, a distance less than 200 feet, before he could accomplish his purpose. Obviously he could have avoided the hazardous and dangerous undertaking to board this engine, as he did, by walking down to where the engine was to stop, as he knew, and it is conceded that he might have gotten upon the step of the tender from the side of the track or could have stood outside of the track, clear of all danger, and handed the key to Taylor as he

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passed. His only excuse for not pursuing one or the other of these obviously safe courses is, that there was a ditch on each side of the track in which there was some water, yet on cross-examination, when pressed to answer whether in crossing this ditch to get in the middle of the track he did not get mud on his feet which caused him to slip and fall when he attempted to board the engine, he stated "No," that he "stepped" over the ditch.

No principle of law is better established than that "where an employee is confronted with two methods of performing work, the one safe and the other dangerous, he owes a positive duty to his employer to pursue the safe method, irrespective of the degree of danger which may be involved in the unsafe method, and any departure from the path of safety will prevent his recovery if he is injured." *Street's admr. v. N. & W. R. Co.*, 101 Va. 746, 45 S. E. 284, and authorities cited; *Newport News, &c., Co. v. Beaumeister*, 102 Va. 678, 47 S. E. 821.

Accepting his statement as true, notwithstanding the strong proof to the contrary, that he was sober when he attempted to board the engine as he did, the fact of the plaintiff's gross negligence so clearly appears that his case is put beyond the possibility that reasonably fair-minded men might differ as to whether or not his negligence contributed directly to his own injury.

This being the situation at the beginning of the occurrences when plaintiff attempted to board the engine and fell under it, the law is equally well settled as to the liability or non-liability of the defendant company for the injuries he sustained.

"One who is injured by the mere negligence of another cannot recover any compensation for his injury if he, by his own ordinary negligence or wilful wrong contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened, except where the direct cause of the injury is the omission of the

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other party, after becoming aware of the injured party's negligence, to use a proper degree of care to void the consequences of such negligence." *Dun v. S. & R. R. Co.*, 78 Va. 545, 49 Am. Rep. 388.

The opinion in that case, by Lacy, J., says: "That a person who, by his own default, has brought upon himself a loss or an injury, can claim no loss or compensation for it from another, is a principle of universal application; and it is equally true that if his imprudence or negligence has so materially contributed to the loss or the injury that but for such imprudence or negligence it would not have occurred, he can claim no recompense from another who has been instrumental in causing it, unless the latter, upon the discovery of the danger into which the party had brought himself by his own fault, could, by the use of such diligence as the extent of the danger and the nature of the threatened injury required, have avoided the concurrence. Hutchinson on Carriers, pp. 502, 505."

This principle of law is clearly discussed and many of the authorities bearing upon it reviewed in the opinion by Buchanan, J., in the late case of *Richmond Pass., &c., Co. v. Gordon*, 102 Va. 498, 46 S. E. 772.

The principle was applied in *Dun v. S. & R. Rd. Co.*, *supra*, where the suit was by a passenger suing for an injury sustained while rightfully on board of one of the defendant's passenger trains and to whom the defendant owed the highest degree of care, and what was said in the opinion and by the text-writer cited applies with greater force to a case such as we have under consideration, since, although conceding that the plaintiff was in the line of his duty when he went to deliver the key to Taylor, the night watchman, the well established principle, that in entering the employ of the master he assumed the risks ordinarily incident to the duties to be performed, also applies, and also the further principle that it is as much the duty of the servant to provide for his own safety from such dangers as are

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known to him, or are discernable by ordinary care on his part, as it is the master's duty to provide for him (*Russell Creek C. Co. v. Wells*, 96 Va. 416, 31 S. E. 614), and that where an employee is confronted with two methods of performing work, the one safe and the other dangerous, he owes a positive duty to his employer to pursue the safe method irrespective of the degree of danger which may be involved in the unsafe method, etc. *Street's admr. v. N. & W. R. Co.*, *supra*; *Bowers v. Bristol Gas & Elec. Co.*, 100 Va. 533, 42 S. E. 296, and authorities cited.

"The extent of a person's duties is to be determined by a consideration of the circumstances in which he is placed. The law imposes duties upon men according to the circumstances in which they are called to act." It is true that "when the facts are disputed, the question of negligence is a mixed question of law and fact. The jury must ascertain the facts, and the judge must instruct them as to the rule of law which they are to apply to the facts as they may find them. Where, however, the direct fact in issue is ascertained by undisputed evidence, and such fact is decisive of the case, a question of law is raised, and the court should decide it. The jury has no duty to perform. The issue of negligence comes within the rule." *Dun v. S. & R R. Co.*, *supra*.

If we concede that the 10th instruction given for the plaintiff with the view of submitting to the jury the question, whether or not Taylor failed to perform his duty after the plaintiff fell under the engine, fairly and correctly propounded that question, although it failed to tell the jury that the defendant company was not liable unless Taylor failed to do his duty after he knew or had notice of plaintiff's peril, we are still of opinion that the verdict of the jury should have been set aside on the ground that it is without evidence to trace actionable negligence to the defendant company.

As to what transpired after the plaintiff fell under the engine and before the engine was stopped—which required but a mo-

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ment of time—there is but little evidence. The engine, including its tender, was about 30 feet long and one of the plaintiff's witnesses, who evinced intelligence to form a correct opinion on that subject, testified that it could not have been stopped in less than a length and a half of itself, which would mean forty-five feet, and in any view of the plaintiff's evidence it did not run over 50 feet after the plaintiff fell, to run which distance, if going the speed claimed by the plaintiff—from 2-1/2 to three miles per hour—required but a few seconds. The engine was unquestionably stopped within the distance of forty-five feet, or about that distance. The plaintiff's statement is that he tried to get on the engine "right under the Larry Trestle," fell and commenced hollowing before he "hit the ground;" that he hollowed "a dozen times I expect," holding on to the step "for fifteen feet or more" and was "hollowing for him to stop all the time"; and he is corroborated as to "hollowing" by several witnesses, one of them about 150 yards away and another in the power house with several engines in motion, but quite naturally neither of these witnesses stated that Taylor heard or could have heard the "hollowing," as they did not know and could not have known the conditions surrounding Taylor. Taylor was in the cab, and the engine was "drifting" along, making "no noise" other than such as is usual when an engine is so moving. He says that he first heard the man "hollow" right under the trestle, right under his feet and about the time he heard his voice he felt the wheels hitting him and frankly admits that when he heard the man under the wheels of his engine he became "rattled and excited" and that it was a moment or two before he could think, but insists that he stopped the engine as soon as it was possible for him to have done so, and there is not the slightest evidence tending to prove that he was unduly excited, or to contradict the statement that he did all he could to stop the engine after hearing the man under it. To hold, according to plaintiff's view, that Taylor heard him "hollowing" to "stop the engine" and paid no heed

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to his cries would be to impute to Taylor a criminal intent to inflict an injury to a man known to be in peril under his engine, when too Taylor was uniformed as to the position of the man, and could not know what was necessary to be done for his protection. Such an imputation could not be justified except upon the clearest and strongest proof, while here it finds no justification whatever, although we may accept as true the statement of the plaintiff's father that Taylor told him "that when he heard him hollow he thought of the oil can that was sitting on the foot-board, he said that was the first thing that came into his mind when he heard him hollow."

Ordinarily it is the party injured who invokes the doctrine sanctioned by this court in *Richmond Ry. & Elec. Co. v. Hudgins*, 100 Va. 409, 41 S. E. 736, that "one may not, by his own negligence or want of proper care, place another in a perilous situation, and when sued for injuries resulting therefrom put the burden on the plaintiff of showing that he acted with reasonable care. Persons in great peril are not required to exercise the presence of mind required of prudent men under ordinary circumstances"; but, as it seems to us, no good reason can be given why the converse of the proposition is not equally sound. Here the party doing the injury, *i. e.* the watchman, or acting engineer, Taylor, claims, and as we think properly, that having been suddenly put into an emergency by the negligence of the plaintiff, the latter could not require of him the wisest possible action. In other words, if the view of the plaintiff in this case be correct, A, by his gross negligence, may require action on the part of B to save him from the consequences of his own fault, and if B does not automatically and instantly do that which will conduce to his safety B is liable. Having no reason, whatever, to expect that the plaintiff, or any one else, would on a dark night attempt to mount the engine in his charge from the middle of the track in front, or be on the track where the engine could inflict an injury upon him, Taylor was, by the negligence of the plaintiff, suddenly put into an

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emergency when and where the wisest possible action on his part could not be reasonably required of him. "It would violate every principle of justice or law if the defendant were compelled to foresee and provide against that which reasonable men would not expect to happen." *Con. Brewing Co. v. Doyle*, 102 Va. 404, 46 S. E. 390.

It was a matter of pure speculation or conjecture as to what Taylor could or should have done after the plaintiff had, by his own gross negligence, gotten beneath the moving engine, since the evidence fails utterly to point out any negligence on Taylor's part intervening between the accident and the negligence of the plaintiff.

"The existence of negligence must not be left entirely to conjecture and courts cannot uphold the tentative conclusions of juries, based upon no sure grounds of inference." *N. & W. R. Co. v. Cromer*, 101 Va. 671, 44 S. E. 898.

This is, therefore, clearly a case where the acts of the plaintiff and the conduct of Taylor were so substantially concurrent as to render it impossible to separate the conduct of the former from the injury itself, whereby plaintiff's right of recovery is precluded. *Seaboard, &c. R. Co. v. Hickey*, 102 Va. 394, 46 S. E. 392; *Richmond Trac. Co. v. Martin*, 102 Va. 205, 45 S. E. 886, and other authorities cited above.

For these reasons, we are of opinion that the lower court erred in overruling the motion of the defendant company to set aside the verdict, and its judgment must be reversed and the case remanded for a new trial.

Reversed.

Statement.

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THE GREAT FALLS POWER CO. v. GREAT FALLS & OLD DOMINION RAILROAD CO.

September 14, 1905.

1. EMINENT DOMAIN—*Corporations—Property Already Condemned—Recent Statute—Construction.*—Prior to the recent statute, now in force, one corporation could not condemn property for its use which had already been devoted to a public use by another corporation possessing the power of eminent domain, and this right will not be extended by construction beyond the explicit requirements of the statute.
2. EMINENT DOMAIN—*Scenic Advantages—Public Use—Corporations—Virginia Statute on Condemnations.*—Scenic advantages, however great, or however much they may increase the revenues of an electric railway company chartered to transport persons and property along its line, are not a public necessity, or an essential public convenience within the meaning of the statute forbidding one corporation to condemn the property of another corporation which has the right of eminent domain. A use for mere scenic purposes cannot be said to be a public use. Moreover, to justify such condemnation it must not only appear that the land sought to be condemned is for a public use, but it must affirmatively appear that a public necessity, or an essential public convenience, requires that the land be taken, and that such land is not essential to the purposes of such other corporation.

Appeal from an order of the State Corporation Commission, granting to The Great Falls & Old Dominion Railroad Company permission to condemn property of The Great Falls Power Company.

Reversed.

The opinion states the case.

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Allan McDermott, William H. White and Richard B. Tunsall, for the appellant.

Moon & Keith and D. S. Mackall, for the appellee.

HARRISON, J., delivered the opinion of the court.

This is an appeal from an order of the State Corporation Commission, granting an application, made by the appellee railroad company, to be allowed to acquire by condemnation proceedings certain lands owned by the appellant power company, situated in the county of Fairfax.

The Great Falls Power Company was incorporated by an act of the General Assembly of Virginia, approved March 3, 1894, as amended by an act approved March 5, 1894—Acts, 1893-4, pp. 669-782—for the purpose of acquiring, holding, improving and using water power at the Great Falls in the Potomac river, and for constructing dams therein, canals and other hydraulic and auxiliary steam works, and for the selling and leasing of water power and using the same for manufacturing, &c., generating, transmitting, selling and leasing electricity, electric power and light for railway and canal as well as other purposes.

The appellant owns on the Virginia side of the Potomac river a tract of land containing between seven and eight hundred acres procured at a cost of \$500,000.00 for the purposes contemplated by its incorporation and has expended a large sum in perfecting elaborate plans for contemplated improvements. This tract of land is shown by the appellee to be "as wild as the Rocky Mountains."

The Great Falls and Old Dominion Railroad Company was incorporated by an act of the General Assembly of Virginia, approved January 24, 1900, as amended by an act approved March 29, 1902—Acts, 1899-1900, p. 148; Acts, 1901-2, p. 457—with power to locate, build and operate a railroad, commencing at some point on the Potomac river, in Alexandria county,

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opposite the District of Columbia, and running thence by the most practicable route to a point on the Potomac river in Fairfax county or Loudoun county, Virginia. The record shows that this railroad line has been located from the Aqueduct bridge, in Alexandria county, opposite the District of Columbia, to a point in Fairfax county on the Potomac river at the Great Falls, a distance of some fourteen miles, and that the work of building an electric railway has been begun and prosecuted to the extent of reconstructing the Aqueduct bridge, and making road-bed, bridges and culverts in Alexandria county at an outlay of about \$300,000.00. Both of these companies, the appellant and the appellee, are given under their respective charters the power of eminent domain.

This proceeding was inaugurated under section 52 of the act concerning corporations, to obtain from the State Corporation Commission a certificate in accordance with the provisions of that section authorizing the appellee to condemn the following three several parcels of land belonging to the appellant, located in the county of Fairfax, at the Great Falls, on the Potomac river: Namely, parcel No. 1 containing .93 acres; No. 2 containing 7.68 acres, and No. 3 containing 9.4 acres. The point sought to be condemned is shown to be "very rough and rugged—rocky. About as wild a piece of property as there is anywhere in the State of Virginia."

Section 52 provides as follows: "*No corporation shall take by condemnation proceedings any property belonging to any other corporation possessing the power of eminent domain, unless after hearing all parties in interest, the State Corporation Commission shall certify that a public necessity or that an essential public convenience shall so require, and shall give its permission thereto; and in no event shall one corporation take by condemnation proceeding, any property owned by and essential to the purposes of another corporation possessing the power of eminent domain.*" Va. Code, 1904, ch. 46a, sec. 1105e, sub-div. 52.

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It is clear from this statute that before the land of the appellant can be condemned by the appellee two facts must be made to appear: 1st, that a public necessity, or that an essential public convenience requires that the land shall be taken; and, 2nd, that such land is not essential to the purposes of the appellant.

Prior to the present law, under which this proceeding was taken, the land of appellant could not have been condemned by the appellee because it had no legislative permission to take the property of another corporation. *Alexandria, &c. R. R. Co. v. A. & W. R. R. Co.*, 75 Va. 780, 40 Am. Rep. 743; *R. F. & P. R. R. Co. v. Johnson*, 103 Va. 456, 49 S. E. 496.

The right, therefore, of one corporation to condemn property already devoted to the public use by another should not be extended by contruction beyond the explicit requirements of the statute giving that power.

The evidence tends very strongly to show that the land sought to be condemned is essential to the appellant for the development of its water power, and that if taken the power company would be compelled to change its plans entirely; that there is a physical conflict between the use contemplated by the appellee and that designed by the appellant. It is not necessary, however, in the view we take of the case, to pass upon or to consider this question.

Its legislative grant of power authorized the appellee to establish a railroad from some point on the Potomac river in Alexandria county, to some point on that river in either the county of Fairfax, or the county of Loudoun. It would meet the requirements of the charter for the terminal of the road to be located at any point on the river within the limits of the counties mentioned. The appellee owns land on the river above, below, and adjoining that owned by the appellant. Above and adjoining the land of appellant, it owns a tract of thirty acres which appears to have been bought with a view to the use now sought to be made, by condemnation, of the land of appellant.

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The property in question, however, covers a commanding view of the Great Falls of the Potomac river, which is shown to be one of the grandest pieces of natural scenery in this country, second only in beauty and attractiveness to the Falls of Niagara.

It clearly appears that this land is sought by appellee as a terminal point on account of the rare scenic features it affords, and because of the attractions it would hold out to pleasure seekers from the city of Washington. In other respects the location possesses none of the advantages ordinarily accruing to a railroad, and but for the beauty of the scene would most likely have been avoided as offering no inducements to such an enterprise. It is further clear from the record that the quantity of land sought to be condemned is far beyond any necessity for mere terminal purposes of an electric railway extending a distance of fourteen miles from the city of Washington. It is manifest from the evidence that the location was selected with no reference to the public use of the road in the matter of freight or the accommodation of the travelling public along the route, but that the real purpose of the condemnation is to establish a park overlooking the Great Falls of the Potomac, for the comfort and pleasure of sight-seers and curiosity seekers, and to thereby add to the revenues of appellee by making the point an attractive place of resort.

To justify the Corporation Commission in taking the action here complained of, it must not only appear that the land sought to be condemned is for public use, but it must affirmatively appear that a public necessity or an essential public convenience requires that the land of the appellant shall be taken.

What is a public use is said to be incapable of exact definition, that it is easier to define by negation than by affirmation. Whatever rule may be formulated on the subject, as a result of the adjudged cases, it cannot, we think, include the condemnation here sought, as one made for a public use. Looking to the charter of the appellee, we find that the company was organized for "public use" in transporting persons and property

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along its line, in other words has undertaken an ordinary railroad enterprise. The ground upon which private property may be taken for railroad uses, without the consent of the owner, is primarily that railroads are highways furnishing means of communication between different points, and promoting traffic and commerce. The taking of property for these purposes must always be limited to the lawful necessities of the enterprise. The moment the appropriation goes beyond such necessity it ceases to be justified on the principles which underlie the right of eminent domain. Cooley's Const. Lim., p. 779-80.

The charter of appellee furnishes no warrant for condemning property for the purpose indicated by the record. It is doubtless an attractive point, on account of its inspiring scenery, for the location of a park, and such a terminal would very probably increase the revenues of appellee; but to gratify the senses of the pleasure seeker and thereby incidentally to increase revenues is without the domain of a public use for which private property may be taken under the power of eminent domain.

In a well considered case in New York, where the railroad company was given power to condemn private property for public use, it applied for the condemnation of a part of the land belonging to De Veaux College, which commands a view of the "Whirlpool Rapids." Its purpose was to give visitors a view of those rapids. It was held that this was not a public use for which private property could be taken, the court saying, in part: "The fact that the road of petitioner may enable the portion of the public who visit Niagara Falls more easily or more fully to gratify their curiosity, or that the road will be public in the sense that all who desire will be entitled to be carried upon it, is not sufficient, we think, in view of the other necessary limitations, to make the enterprise a public one so as to justify condemnation proceedings. The case does not, we think, differ in principle from an attempt on the part of a private corporation, under color of an act of the Legislature,

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to condemn lands for an inclined railway, or for a circular railway, or for an observatory, to promote the enjoyment or convenience of those who may visit the falls." *In re Niagara Falls & W. Ry. Co.*, 108 N. Y. 375, 15 N. E. 429.

This case is very much in point and the authorities there cited and the reasons given apply with equal force to the case at bar, for it is clear from the record that the part of the railroad running through the land of the appellant is not intended for ordinary traffic, but only for sightseers.

We have seen that the use here sought to be made of appellant's property is not a public use in the sense that it can be taken under the power of eminent domain. The case at bar is, however, very much stronger than the Niagara Falls case, because, granting that the use sought to be made by appellee of the land in question came within the meaning of a "public use" justifying condemnation, still the land could not be taken, for the appellant being a corporation with the power of eminent domain its land could not be condemned by another corporation possessing that power, unless the public use sought to be made of it reached the measure of a public necessity or an essential public convenience. This is the express mandate of the recent statute under which this proceeding is had, and without which the application of appellee could not be entertained.

Scenic advantages were held in the Niagara Falls case not to reach the measure of a public use justifying condemnation proceedings; *a fortiori* must such advantages fail for insufficiency when subjected to the test of the *public necessity* contemplated by our law. Spending a pleasant day in the midst of wild and rugged surroundings on the banks of the Potomac, viewing its "Great Falls" while strolling in a beautiful park, would doubtless be both inspiring and invigorating to those who had the time and opportunity to enjoy it. That sightseers should be furnished such an opportunity may be desirable, but it cannot be said to be a public necessity demanding the displacement of appellant from its private ownership by the compulsory proceedings here invoked.

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For these reasons we are of opinion that the State Corporation Commission erred in awarding appellee the certificate complained of, and, therefore, its action must be reversed, the order appealed from set aside, and the cause remanded to the State Corporation Commission for such further proceedings in the premises as the appellee may be advised to take with a view to condemning land for its uses through the lands of the appellant not in conflict with the views expressed in this opinion.

Reversed.

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Staunton.

SHIFLETT v. GRIMSLEY, JUDGE.

September 21, 1905.

1. TAXATION—Distiller's License—Amount of Tax—Computation of Time.—

The statute fixing a license tax on distillers at five dollars for any period under three months, at twenty dollars for more than three but less than six months, and at fifty dollars for six months or more, must if possible be so construed as to be in harmony with section 555 of the Code, providing that all licenses, with a few exceptions, shall terminate on the 30th day of April, so that both statutes may stand, if possible. The two may be reconciled and effect given to both by only allowing the qualified or limited license to be issued within the limited period from the termination of the fiscal year, and this seems to be the reasonable and rational construction of the statutes in question.

Original application for a *mandamus* to compel the granting of a distiller's license.

Refused.

R. S. Thomas and John S. Chapman, for the petitioner.

BY THE COURT:

This case arises upon an application of Shiflett for a license to manufacture and distill alcoholic liquors by direct fermentation and distillation from pomace for a period of three months, beginning on the 24th day of August, 1905, and ending on the 24th day of November, 1905, the business to be conducted at the home of the petitioner in the county of Greene. According to petitioner's view of the law, he was required to pay for this

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privilege the sum of five dollars, which he deposited with the treasurer of Greene county. He showed to the satisfaction of the court that he was a fit person to conduct that business; that he would keep an orderly house; and that the place where the business was to be conducted was suitable, convenient, and appropriate. As to all of these questions there is no controversy.

The judge of the Circuit Court, however, was of opinion that a person applying for a license such as that asked for by petitioner, should be required to pay fifty dollars for the privilege, and refused to grant the license unless the latter sum was paid. Thereupon, Shiflett applied to this court for a mandamus.

By section 555 of Va. Code, 1904, it is provided, among other things, that "all licenses shall expire on the 30th day of April, except licenses to theatres, public shows, exhibitions or other performances, and to bowling alleys and to billiard and bagatelle tables at watering places."

By section 141 of an act to raise revenue for the support of the government and public free schools, etc., approved April 16, 1903, as published by the Auditor of Public Accounts, with amendments to the adjournment of the General Assembly of 1904, it is provided, that "no person, corporation, company, firm, partnership, or association shall, within the limits of this State, engage in the business of rectifying, or of manufacturing or distilling malt or alcoholic liquors, other than wine, or sell, or offer to sell, by sample or representation or otherwise, wine, ardent spirits, malt liquors, or any mixture thereof, alcoholic bitters, bitters containing alcohol, or fruit preserved in ardent spirits, either by wholesale, retail, or to be drunk at the place where sold, or in any way, without first having obtained license therefor. . . . Every manufacturer or distiller of alcoholic liquors shall pay for said privilege, at the time his license is granted, a specific sum therefor to be graduated and classified as follows: . . . The manufacturer of alcoholic liquors by direct fermentation and distillation from pomace, or from cider or fruits, where the distillery is run less than three months,

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shall pay a specific sum of five dollars, but if the distillery is run more than three months and less than six the specific amount to be paid for the privilege shall be twenty dollars, and if run six months or more there shall be paid for the privilege fifty dollars."

The last mentioned act was passed at a later date than section 555, and by section 146, it is provided that "all acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

The contention of petitioner is that section 555, which provides that all licenses shall terminate on the 30th of April, is in that respect inconsistent with the tax law, which provides for the issuing of a license such as he desires for a period of three or more months, and that by the terms of the tax law, upon the tender of five dollars he is entitled to a license for the manufacture of alcoholic liquor by direct fermentation, etc., to begin at any period which the applicant may desire, and to extend for the period of three months next ensuing.

If section 555 and the tax law can by any reasonable construction stand together and be enforced, then it is the duty of the courts to give effect to both of them, for repeals by implication are not favored, and section 555 is now in force unless by reason of its inconsistency and repugnancy to the will of the Legislature as last declared in the tax law it has been repealed. If the construction contended for by the petitioner be the correct one, it leads to a result so extraordinary as to fall little short of an absurdity. The law provides that for a license to run for a period of six months or more there shall be paid the sum of fifty dollars; and yet, if the contention of the petitioner be correct he can, by dividing the year into four periods of three months and applying for a license to run for three months only, enjoy the privilege for the entire year at a cost of twenty dollars. Such a result is not to be reached unless the language of the law be so plain as to exclude any other construction.

His honor, Judge Grimsley, after stating these views with

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much precision in his answer, suggests a theory upon which the two laws may be reconciled and both be given a reasonable and rational construction, and it is that the qualified or limited license is to be issued within the limited period from the termination of the fiscal year—that is to say, that an applicant who applies on the last day of January for the privilege here sought, to run until the 30th of April, which is three months, would be entitled to it upon the payment of five dollars and proof of the other requisites enumerated in the law. So, still taking the end of the fiscal year, or the 30th of April, as the date on which the license would terminate, the applicant would be entitled to the privilege for a period of less than six months, beginning, for instance, on the 2nd day of November, upon the payment of twenty dollars. The Legislature in passing the tax bill, of course had before it all the laws bearing upon the subject; and it is far more reasonable to suppose that they intended that the tax law should be construed in harmonious relation to section 555, than that it should have enacted a law which requires a tax of fifty dollars for the exercise of a privilege for six months or more, and then have proceeded to render this provision nugatory by permitting the applicant to subdivide the year into four parts and obtain a license covering the whole period upon the payment of two-fifths of the sum which it has just solemnly declared was the price fixed upon the privilege.

There are, perhaps, other grounds upon which our conclusion could be sustained, but under the circumstances disclosed by the record we prefer to rest our judgment upon a construction of the law.

The application for a writ of mandamus is denied.

Mandamus refused.

Syllabus.

Staunton.

MERRIMAN v. COVER, DRAYTON & LEONARD.

September 21, 1905.

1. **CONTRACTS—Two Constructions—One Rendering Contract Void.**—Where a contract is susceptible of two constructions, by one of which it would be rendered valid, and the other void, the former will be given, if reasonable, as it will not be presumed that the parties intended to do that which they had no right to do.
2. **CONTRACTS IN RESTRAINT OF TRADE—Reasonable Restraint—Case at Bar.**—A contract in restraint of trade is valid, when founded on a valuable consideration, if the restraint imposed is reasonable as between the parties, and not injurious to the public by reason of its effect upon trade. Whether or not the restraint is reasonable is to be determined by considering whether it is such only as to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public. Upon the evidence in the case at bar, the stipulation by defendants as private individuals and owners of a steam railroad, engaged in private carriage, that no chestnut oak bark shall be shipped over their road except to the plaintiffs, unless they refuse to pay the market price therefor at their own, or any other large tannery in that county, is reasonable as between the parties and does not injuriously affect the public, and hence is valid.
3. **PLEADING—Contracts Prima Facie in Restraint of Trade—Facts and Circumstances.**—In an action on a contract in restraint of trade, if the contract on its face is *prima facie* an unreasonable restraint on trade, the facts and circumstances showing the restraint to be reasonable may be averred in the declaration and proved on the trial, provided they do not vary, alter or contradict the terms of the contract.
4. **PLEADING—Answering Adverse Allegations—Case at Bar.**—A plea which professes to answer the whole of what is adversely alleged in the declaration, but fails to do so, is bad and should be rejected. In the case at bar the declaration alleges that the defendants, their successors or assigns, did build and operate the railroad in the declaration mentioned, but the plea denied that the defendants built and operated the road and did not deny that it was built and operated by their successors or assigns.

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5. **PLEADING—Rejecting Plea—Evidence Under Other Pleas.**—The rejection of a plea is not a reversible error, when all that could have been proved under it was admissible under other pleas which were received.
6. **CONTRACTS—Illegality—Knowledge of Illegality—Agreement—Common Carriers.**—If the contract for the construction and operation of a railroad contains stipulations which a common carrier of freight cannot lawfully make, and it is known by the parties at the time the contract is made that the proposed road is to be constructed and operated as a common carrier of freight, such contract is illegal because contrary to public policy. It is not necessary that there should have been an agreement between the parties that the proposed road should be constructed and operated as such common carrier.
7. **CONTRACTS IN RESTRAINT OF TRADE—Reasonableness—Burden of Proof.**—Generally a party who seeks to enforce a contract in restraint of trade has the burden of proof to show that the restraint is reasonable, but if the contract shows on its face that it is reasonable, and the defendant seeks to avoid it by some extrinsic matter which renders it illegal, the burden is on him to establish such illegality by clear and satisfactory evidence.
8. **CONTRACTS—Time of Performance.**—Where a contract is silent as to the time within which an act is to be done, the law implies a reasonable time.
9. **INSTRUCTIONS—Sufficiently Instructed.**—It is not error to refuse correct instructions where the jury has already been sufficiently and correctly instructed on the points covered by the rejected instructions.

Error to a judgment of the Circuit Court of Giles county, in an action of *covenant* by Cover, Drayton & Leonard against E. B. Younken and W. E. C. Merriman, partners under the style of E. B. Younken & Co. Process was served only on Merriman. Judgment for plaintiffs. Defendant assigns error.

Reversed.

The agreement which was the foundation of this action was in the words and figures following, to-wit:

“This agreement, made and entered into this the 18th day of September, 1899, between Thomas Cover, Loring A. Cover, H. E. Drayton and Thomas Leonard, partners in the name and style of Cover, Drayton & Leonard, and their survivors, successors and assignees, parties of the first part, and E. B. Younken and W. E. C. Merriman, partners in the name and style of E. B. Younken & Company, their survivors, their successors and assignees, parties of the second part; witnesseth:

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"First. That subject to the conditions hereinafter set forth the parties of the first part do hereby grant unto the parties of the second part, the right to build a railroad over the land of the parties of the first part, in Giles county, Virginia—known as the Narrows Tannery property, which road is to begin at or near the little yellow house on the Tannery siding and run in a westerly direction not nearer than twenty feet from a bark shed and between the office building and stable, and on H. W. Hale's land.

"The said parties of the second part shall have the right to connect the said road with the main siding of the parties of the first part at or near the said yellow house, and the right to use said siding jointly with parties of the first part for railroad purposes from said connection to the Norfolk & Western Railway and to grant the Norfolk & Western Railway Company the right to use said siding in handling the business of the said parties of the second part; but said parties of the first part do not guarantee that said parties of the second part can use that part of said siding, that it is on the property of the Norfolk & Western Railway Company, nor do the parties of the first part guarantee to the parties of the second part the right to connect with the Norfolk & Western Railway Company. The right of way for a railroad herein granted shall only be as wide as may be necessary, and shall not exceed ninety (90) feet in width at any point.

"Second. The rights herein granted to said parties of the second part shall cease and become void unless they shall within two years from this date build a railroad of standard gauge from said authorized connection at said siding at least so far as the Boyd place on Wolf creek in said Giles county, a distance of six miles more or less.

"Third. The said siding is not to be blocked by parties of the second part, and not to be so occupied with rolling stock nor used so as to interfere with the business or traffic of the parties of the first part over said siding.

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"Fourth. Sufficient and suitable cattle guards are to be built by the parties of the second part on the road over the tannery property; all fences and gates are to be put in as good condition by parties of the second part as they are when they begin building the road.

"Fifth. As compensation for the use of the siding as herein granted said parties of the second part will furnish or have furnished all ties required to keep it in repair, and will place them in the track, and will also pay half of the costs of any new rails that may be necessary to keep the siding in good condition.

"Sixth. The parties of the second part are to be responsible to the Norfolk & Western Railway Company for any accident that may occur to any property of said railway company by reason of the use or permission to use said siding.

"Seventh. If the parties of the second part shall fail to complete and operate the said road as far as the Boyd place, or further as aforesaid, within two years from this date, they are to compensate the parties of the first part for all damages to their property occasioned by the building of said road, in whole or in part, on the said land, said damage to be ascertained by arbiters, each party to select one arbiter and the two arbiters an umpire.

"Eighth. The parties of the second part agree that no locomotive belonging to or used by them shall during the night time enter the railroad on said Tannery property.

"Ninth. The parties of the second part agree that no chestnut oak bark shall be shipped over their road, no matter how far it extends, except to the parties of the first part, unless the parties of the first part refuse to take said bark at the market price.

"The parties of the second part are to notify the parties of the first part on or before the 15th day of January of each

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year how much bark they desire to furnish over said road, and the parties of the first part are to name the amount of bark they are willing to take at the market price, and said parties of the second part will deliver it at said tannery.

"By 'market price' is meant price paid at said tannery or at any other large tannery in Giles county, Virginia, for bark delivered at said tannery or tanneries. The rates for shipment of bark over said road to parties other than the parties of the first part shall be at least as high as the rate charged for shipment to the parties of the first part.

"Tenth. The said parties of the first part have a private road on their said tannery property between the scales and the public road, and the railroad to be built by the parties of the second part will be built across and below the grade of said private road. The parties of the second part will either erect a suitable bridge over their railroad where it crosses said private road, and build easy and convenient approaches to said bridge for both sides, or they will build for said parties of the first part easy and convenient approaches and road to and over said crossing.

"If a bridge is built, the parties of the second part will keep it in repair and in good condition, and said bridge and road to be built shall be suitable for heavy wagon hauling. The main water pipe leading from the mountain to the tannery shall, if necessary, be sunk by the parties of the second part at the point where the railroad tract will cross it and be properly protected.

"Eleventh. Should the parties of the second part fail at any time to operate the railroad to the Boyd place, or beyond for a period of two years, or should they fail to keep any of their aforesaid agreement, then all the rights and privileges herein granted to them shall forever cease, and shall revert to the parties of the first part.

"Twelfth. The parties of the first part can make any connection or connections in the railroad tract of parties of the second part that they see proper for siding or sidings on their land.

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"This agreement is signed in duplicate, each copy to be treated as an original.

"Witness the following signatures and seals.

"THOMAS COVER,	(Seal)
"L. A. COVER,	(Seal)
"H. E. DRAYTON,	(Seal)
"THOS. LEONARD,	(Seal)
"E. B. YOUNKEN,	(Seal)
"W. E. C. MERRIMAN.	(Seal)"

John H. Fulton, Sam'l W. Williams and Edward W. Robertson, for the plaintiff in error.

Archer A. Phlegar and Barton & Boyd, for the defendants in error.

BUCHANAN, J., delivered the opinion of the court.

This is an action of covenant upon an agreement entered into by the defendants in error, as partners doing business under the firm name of Cover, Drayton and Leonard, and the plaintiff in error and another, doing business as partners under the firm name of E. B. Younken & Co.

The principal question involved in this writ of error is whether or not the contract sued on is in restraint of trade and contrary to public policy, and therefore void.

At the time of the execution of the contract, the plaintiffs, parties of the first part, were the owners of land in Giles county near the mouth of Wolfe creek, upon which they had a tannery, and were engaged in the manufacture of leather. Upon their premises was a railroad siding or track owned and controlled by them, which connected with a siding of the Norfolk and Western Railway, whose line passes through the plaintiffs' premises. The parties of the second part wished to build a

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railroad up Wolfe creek at least as far as their property, a distance of about six miles. In order to do this they deemed it advisable to get the right to build their road over the plaintiffs' premises, and to connect with and use the latter's siding, which connected with the Norfolk & Western Railway. In consideration of those rights which the contract sued on grants them, the parties of the second part, among other things, agreed, "that no chestnut oak bark shall be shipped over their road, no matter how far it extends, except to the parties of the first part, unless the parties of the first part refuse to take the said bark at the market price." The declaration sets out the contract in full, the circumstances under which, and the purposes for which, it was entered into, the building of the road, and assigns as a breach thereof the failure and refusal of the defendants to deliver to the plaintiffs the chestnut oak bark shipped over their road during the season of 1902 as they had agreed to do.

The plaintiff in error, the only one of the parties of the second part upon whom process was served, demurred to the declaration. The action of the court in overruling his demurrer is assigned as error.

The grounds of demurrer chiefly relied on here, and which require special notice, are that the declaration, by setting out in full the contract sued on, shows on its face that it was *prima facie* illegal and void, in that it was a contract in restraint of trade, and particularly against public policy, and, second, that the averments of the declaration are not sufficient to exclude such presumption.

It is conceded by the plaintiff's counsel, as we understand their arguments, that if the parties of the second part had been an incorporated railway company the contract would be illegal, and that their action could not be maintained.

When the contract was entered into, the parties of the second part were partners and not an incorporated railway company. While there is language in the contract from which it might be

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inferred that the road to be built was to be operated as a common carrier of freight for hire, there is other language from which it could be inferred with as much reason that it was not to be so operated.

Where two constructions may be given a contract or a statute, one of which would render it valid and the other of which would destroy it, the former construction will be given it if reasonable, for in such a case neither the contracting parties nor the Legislature will be held to have intended to do that which they had no right to do. *Martin v. South Salem, &c., Co.*, 94 Va. 28, 37, 26 S. E. 591; 9 Cyc. 586.

Having reached the conclusion that the contract upon its face does not show that the road to be built was to be a common carrier for hire, is the restraint imposed upon the defendants by the contract contrary to public policy?

The early English cases seem to have treated all restraints upon trade, whether limited or unlimited, as contrary to public policy, and therefore void. That doctrine, as the conditions of society and trade have changed, has been modified from time to time.

In the case of *Reynolds v. Mitchell*, 1 P. Wms. 181, decided nearly two hundred years ago, in which many, if not all, of the cases were reviewed, and which has been referred to as "the foundation of the rule in relation to the invalidity of contracts in restraint of trade," Chief Justice Parker was of opinion that general restraints, or restraints extending to the whole kingdom, were void; that particular restraints, or restraints as to particular persons or places, if made upon a good and adequate consideration, and under circumstances which showed that it was reasonable for the parties to enter into them, were valid. And to the same effect are the earlier American cases. But in some of the later cases, both in England and this country, there has been a tendency to ignore the distinction between general and partial restraints, and to hold that restraints are valid and enforceable when they are not greater than are necessary for

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the fair protection of the covenantee in respect to the subject matter of the contract, and not injurious to trade in general. See note to *Richards v. Am. Desk, &c. Co.*, 10 Am. R. R. & Corp. Rep. 99, 107, and following, where many cases are collected showing generally the history and course of decision on the subject; 24 Am. & Eng. Ency. of Law (2nd Ed.), 843, *et seq.*, and cases cited; 9 Cyc. 525 and cases cited.

But whatever may be the better rule, where the restraint is general, it is well settled that where the restraint is limited, and there is a valuable consideration to support it, the contract is valid if the restraint imposed is reasonable as between the parties, and not injurious to the public by reason of its effect upon trade.

Whether or not the restraint is reasonable is to be determined by considering whether it is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interest of the public. *Hornér v. Gaves*, 7 Bing. 735; *Ross v. Sadgbeer*, 21 Wend. 166; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315.

The restraint in the contract under consideration is limited. It does not prevent the defendants from carrying on their business, or abridge their rights in any respect other than that no chestnut oak bark shall be shipped over their road except to the plaintiffs, unless they refuse to pay the market price therefor at their own or any other large tannery in that county. As between the parties such a restriction does not seem to be unreasonable. It would hardly be seriously insisted that a land owner who was operating a flouring mill upon his lands would not have the legal right, in granting another private individual a wagon way over his land, to make it a condition to the exercise of such right, and as a consideration therefor, that no wheat should be hauled over that wagon way except for the mill owner, unless he refused to take it at the market price. The fact that the right granted is for a steam railroad, where the parties are private individuals, does not affect the question.

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Neither does the restriction injuriously affect the public. Before the contract was made the defendants had no right to haul anything over the plaintiff's lands for sale to the public. By virtue of the contract they acquire the right to haul all commodities over it without restraint, except chestnut oak bark. If the contract has any effect upon the rights of the public, it enlarges rather than lessens them.

But if the contract on its face were *prima facie* an unreasonable restraint upon trade, the averments of the declaration as to the circumstances under which, and the purposes for which, it was entered into, if such averments can be considered, exclude that presumption. It is true, as argued, that averments of facts are not proper in a declaration which add to, vary, or otherwise alter the contract sued on, and that such averments are not admitted to be true by a demurrer to the declaration since a demurrer only admits such facts as are well pleaded. *Thomas v. Jones*, 21 Gratt. 96; *Newberry Land Co. v. Newberry*, 95 Va. 123, 27 S. E. 899. But, in determining whether or not a contract in restraint of trade is reasonable, each case must be considered in the light of its own facts and circumstances. *Oregon Steam, &c. Co. v. Winsor*, *supra*. This being so, such facts and circumstances, in so far as they do not add to, vary, or otherwise alter the writing sued on may be shown by proof, and it would seem to follow as a matter of course that they may be averred in the declaration.

In the case of *Ross v. Sadgbeer*, 21 Wend. 166, 168, it was said by the Court of Appeals of New York, that "although it does not appear on the face of the contract that there was good reason for making it, the plaintiff may, I think, help out his case by proper averments in pleading. See *Mitchell v. Reynolds*, 1 P. Wms. 181; *Homer v. Ashford*, 3 Bing. 322. Such averments will not contradict the deed, because that expresses no consideration whatever; and if the special circumstances were such as will uphold the contract of the parties I see no very

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good reason why the plaintiff should not be allowed to aver and prove them. The point seems never to have been directly adjudged, and perhaps we ought not to pass definitely upon it in a case where the question has not been discussed by counsel."

In *Richards v. Am. Desk, &c. Co.* (Wis.), 10 Am. R. R. & Corp. Rep. 99, 105, 58 N. W. 787, it was held that a pleading would be bad on demurrer if it did not appear from the contract or averments of extrinsic facts that the restraint was reasonable. This, said the Supreme Court of Wisconsin in that case, was in accord with the great weight of authority, and seems to be the necessary result of the rule as to the validity of such restraint.

Construing the contract in the light of the circumstances under which, and the purposes for which, it was executed, as averred in the declaration, we are of opinion that the demurrer to the declaration was properly overruled.

The trial court rejected pleas numbered 1 and 2, offered by the defendant. This action of the court is assigned as error.

Plea No. 1 professes to answer the whole of what is adversely alleged in the declaration, but in fact does not do so. The contract provides that the railroad mentioned therein may be constructed and operated by the parties of the second part, their successors, or assigns. The declaration follows the language of the contract; yet the plea denies that the parties of the second part built and operated the road, and does not deny that it was built and operated by their successors or assigns. All that is in the plea may be true, and yet the plaintiff be entitled to recover. The plea was clearly bad, and was properly rejected. *Hurt's Admr. v. Martin's Admr.*, 8 Gratt. 578.

No prejudice resulted to the defendant from the rejection of plea No. 2. All that could be proved under it was admissible under pleas 7 and 8 which were received.

The action of the court in refusing to give certain instructions asked for by the defendant, in refusing to give certain other instructions as asked, and in giving them as amended, and in giving certain instructions asked for by the plaintiffs is assigned as error.

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There was evidence tending to prove that it was known to the plaintiffs that the railroad to be constructed was to be operated as a common carrier; that the company to construct and operate it was to be chartered by the General Assembly as a common carrier of freight and passengers; that the contract sued on was entered into with such knowledge on the part of the plaintiff, and, after such company was so chartered, the contract sued on was assigned to the chartered company; that this assignment was made with the consent of the plaintiffs on condition, however, as shown by the assignment, that the chartered company should assume and carry out all the covenants of E. B. Younken & Co. set out in the contract sued on, and on the further condition that Younken & Co., individually, and as partners, should not be released from the performance of such covenants. It further appeared that the chartered company, after the assignment, completed the road, and have since been operating it.

Instruction No. 1, as offered by the defendant, was as follows:

"The court instructs the jury that, by virtue of the character of railroad companies as common carriers of goods, they are under a general duty to receive and carry, when properly offered, all goods of the kind they undertake or assume to transport, and that a contract by which they undertake to carry for one person or corporation to the exclusion of others, is contrary to public policy and void; and if they believe from the evidence that at the time of making the contract in the declaration mentioned, it was known and *contemplated* by and between the parties that the railroad to be built, provided for in said contract, was to become a common carrier of freight and passengers, and that, in pursuance of such *contemplation*, the General Assembly of Virginia granted a charter of incorporation to W. E. C. Merriman, E. B. Younken and others under the name of the New River, Holston & Western Railroad Company, whereby it became empowered to construct, operate, and maintain said

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railroad for the purpose of carrying passengers and freight, and did after the passage of said act of incorporation enter into, in pursuance of the original understanding and contemplation of the parties, a contract dated the 4th day of June, 1901, under which it assumed and agreed to carry out the said contract in the declaration mentioned, then the court instructs the jury that said two contracts are to be considered as one, and they are contrary to public policy and void, and the jury must find for the defendant.

For the word "contemplated" in that instruction the court substituted the words "mutually understood and intended," and for the word "contemplation" next following the court substituted the words "knowledge and intention." This action of the court it assigned as error.

It seems that in England, where the agreement is not itself in violation of law, but the intention of one of the parties is unlawful, as where goods are purchased or money is borrowed for an unlawful purpose, the mere fact that the party selling the goods or loaning the money knows of such unlawful purposes renders the agreement illegal, and it cannot be enforced.

In this country, while some of the courts have followed the English rule, the majority have taken a different view, and have held that the mere knowledge of the seller or the lender that the purchaser or borrower intends to make an illegal use of such goods or money is no defense to an action for the purchase price. 9 Cyc., 570-571, and notes citing English and American cases.

Which of these rules is the better need not be considered, as that is not the question involved in this case. If it was known by the plaintiffs, when the agreement sued on was entered into, that the proposed railroad was to be constructed and operated as a common carrier of freight, as alleged in special pleas 5 and 9, and as stated in the instruction under consideration, the contract was illegal, because contrary to public

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policy, for no one has a right to enter into an agreement for a consideration which he knows cannot be furnished, or the obligation imposed by it cannot be performed by the other party without a violation of law.

It was not necessary, therefore, that there should have been an agreement between the parties that the proposed railroad was to be constructed and operated as a common carrier, as counsel for the plaintiffs insist, and as the court seems to have thought when it modified the instruction under consideration.

And for like reasons the action of the court in modifying the defendant's instructions Nos. 2 and 3, and in giving the plaintiff's instructions numbered 1 and 2 was erroneous. A further objection made to the plaintiffs' instruction No. 2 is that it imposed upon the defendant the burden of proving clearly and unequivocally that it was known and mutually understood and intended by the parties that the road to be built was to be constructed and operated as a common carrier.

The general rule is that a party who seeks to enforce a contract in restraint of trade must show that it is reasonable and the burden of proof was on the plaintiffs to do this. *Mitchell v. Reynolds, supra*; *Ross v. Sadgbeer, supra*; *Richards v. Am. Desk, &c. Co.*, 10 Am. R. R. & Corp. cases, and notes 99, 105, 171-2. But if the contract upon its face shows that it is reasonable, as in this case, and the defendant seeks to avoid it by some extrinsic matter which renders it illegal, the burden is upon him to establish such illegality, as in other cases where the illegality of a contract is set up as a defense to a contract valid upon its face, by clear and satisfactory evidence. *Burdine v. Burdine*, 98 Va. 523, 36 S. E. 992, 81 Am. St. Rep. 741; 9 Cyc., 762; *Sissons v. Dixon*, 12 E. C. L. 371; *U. S. v. Trans. Freight Asso.*, 58 Fed. 58, 78, 7 C. C. A. 15, 24 L. R. A. 73; *McBiatney v. Chandler*, 31 Am. Rep. 213, 215.

By the terms of the contract the defendants were to notify the plaintiffs on or before the 15th day of January of each year how much bark they desired to furnish over said road, and they

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(the plaintiffs) were to name the amount of bark they were willing to take at the market price. Instructions numbered 4 and 5, as offered by the defendant, in effect told the jury that if the defendants on or before the 15th day of January, 1902, named the amount of bark they desired to ship the plaintiffs, that it was the duty of the plaintiffs at once to name the amount of bark they would take.

As the contract did not fix the time when the plaintiffs were to say how much bark they would take, the law implied that they had a reasonable time within which to do so. (*Young v. Ellis*, 91 Va. 297, 301, 21 S. E. 480; *Wilcox v. Southern Ry Co.*, 99 Va. 394, 39 S. E. 144), and the court properly modified the instructions in that respect.

What has been said in reference to the defendants' instructions Nos. 4 and 5 applies equally to the objections made to the court's action in giving the plaintiffs' instruction No. 4.

The refusal of the court to give instructions numbered from 7 to 13 inclusive, offered by the defendant, is assigned as error. No reason is given in the petition to sustain this assignment of error, and it seems to be little relied on in the briefs. It will, therefore, be sufficient to say that in so far as they announce correct principles of law applicable to the case such principles were substantially embraced in the instructions which were given, and there was no error in the court's refusing to give them.

As the judgment of the Circuit Court will have to be reversed, the verdict set aside and a new trial granted because of erroneous instructions given, as hereinbefore pointed out, it will be unnecessary to consider the remaining assignments of error as to the refusal of the court to arrest the judgment, and set aside the verdict for the reasons set out in the defendant's bill of exceptions Nos. 3 and 4.

Reversed.

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Staunton.**WEAVER & OTHERS v. GLENN.****September 21, 1905.**

1. **PLEADING—Infants—Guardian ad litem—Failure to Appoint—Effect.**—An infant can only appear and defend an action by a guardian *ad litem* duly appointed for that purpose, and the omission to appoint such guardian *ad litem* is reversible error in all cases unless it appears that the judgment is for the infant, and not to his prejudice.

Error to a judgment of the Circuit Court of Augusta county, in an action of ejectment. Judgment for the plaintiff. Defendants assign error.

Reversed.

The opinion states the case.

Curry & Glenn, for the plaintiffs in error.

WHITTLE, J., delivered the opinion of the court.

This action of ejectment was brought by the defendant in error against the plaintiffs in error to recover the land described in the declaration. At the trial, the defendants without waiving any of their rights, agreed with the plaintiff to submit all matters of law and fact to the determination of the court, whereupon a joint judgment was rendered against them for the land in controversy and costs.

It appears that four out of the five claimants of the property in fee simple are infants, and that no guardian *ad litem* was appointed to defend them, which omission constitutes the first

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assignment of error. In every action or suit against an infant defendant, it is the duty of the court wherein the same is pending, or of the judge or clerk thereof in vacation, to appoint a guardian *ad litem* to represent the interest or estate of the infant. Va. Code, 1904, sec. 3255.

"So necessary is the appointment of a guardian *ad litem* esteemed," says Mr. Minor, "that although the process against an infant is issued and executed against him just as against an adult, and the declaration or bill setting forth the complaint is framed and filed in like manner, yet, after the declaration or bill is filed, no rule or any proceeding whatever can be had lawfully until a guardian is designated; and any step that is taken will be void as to the infant." 1 Minor's Inst. (2nd Ed.), 432; 1 Barton's Law Pr. 206.

In *Turner v. Barraud*, 102 Va. 324, 46 S. E. 318, this court held: "The only way known to our law of bringing an infant before a court is by a guardian *ad litem* appointed to conduct his defense for him. If he has appeared in a suit by a guardian *ad litem* regularly appointed for that purpose, he cannot afterwards, in an independent suit impeach a decree rendered against him for errors and irregularities in the proceedings in the suit in which the decree was rendered; but if no guardian *ad litem* was appointed or recognized by the court, he is not bound by the action of one who assumed to act for him, and the decree against him is void, and may be collaterally assailed."

In the yet more recent case of *Langston v. Bassette*, ante, p. 47, 51 S. E. 218, it is said: "As an infant can only appear and defend by guardian *ad litem*, proceedings against him are generally fatally defective unless the record shows that a guardian *ad litem* was assigned him. Code, 1887, sec. 3255 (Va. Code, 1904, p. 1714). See *Roberts v. Stanton*, 2 Munf. 129, 5 Am. Dec. 463; *Cole v. Pennell*, 2 Rand. 174; *Parker v. McCoy*, 10 Gratt. 594; *Ewing v. Ferguson*, 33 Gratt. 548; *Turner v. Barraud*, 102 Va. 324, 331, 46 S. E. 318; note to *Caperton v. Gregory*, 11 Gratt. (Va. Rep. Anno.), at page 251 *et seq.*, where a number of cases on the subject are collected."

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The omission to appoint a guardian *ad litem* for an infant defendant is reversible error in all cases, unless it appears that the judgment or decree is for the infant, and not to his prejudice. Va. Code, 1904, sec. 3449; *Langston v. Bassette, supra*.

Without passing upon any other assignment, we are of opinion that for this initial error the judgment complained of must be reversed, and the case remanded for further proceedings to be had therein in conformity with this opinion.

Reversed.

Statement.

Staunton.

WILSON V. MILLER AND WIFE.

September 21, 1905.

1. *EQUITY—Jurisdiction—Discovery and Relief—Agency Involving Trust and Confidence.*—An agent to sell land of his principal and collect the proceeds, and also to demand, sue for and collect all debts, rents, accounts and other claims which may be due to his principal, occupies a position of trust and confidence towards his principal, and where, after the lapse of many years, his accounts have become complicated by reason of collections from various sources, and disbursements for expenses and remittances to his principal, equity has jurisdiction of a bill by the principal praying for a discovery from the agent, and a proper settlement of his accounts. The remedy at law in such a case is not plain simple and free from difficulty.
2. *LIMITATIONS OF ACTIONS—Continuous Agency—Case in Judgment.*—As a general rule, when there is an undertaking or agency which requires a continuation of services, the statute of limitations does not begin to run until the termination of the undertaking or agency. The facts in this case do not take it from under the influence of the general rule. The agency was continuous for 17 years; the transactions were numerous, involving a long and complicated account, the details of which were known only to the agent, and the principal was a non resident and compelled to rely upon the agent for a faithful discharge of his trust.

Appeal from a decree in chancery of the Circuit Court of Rockbridge county. Decree for complainants. Defendant appeals.

Affirmed.

The opinion states the case.

David E. Moore, for the appellant.

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Greenlee D. Letcher, for the appellees.

HARRISON, J., delivered the opinion of the court.

Having removed from the county of Rockbridge, Va., to the State of Oregon, the appellees, on December 19, 1881, executed a power of attorney appointing the appellant their attorney in fact to sell and convey all real estate owned by them in the county of Rockbridge, and to collect the proceeds; also to demand, sue for, and collect all debts, rents, accounts, and other claims which might be due, payable, and owing to the appellees in the county of Rockbridge. The power and authority vested in the appellant by this instrument was full and complete to do any and all things in the premises that the grantors could perform if present in person.

The appellant assumed the duties and obligations thus imposed upon him, and, from the date of his authority in 1881 to the year 1898, was from time to time collecting rents, selling real estate, wood, railroad ties, etc., and disbursing the proceeds in expenses of various kinds and in remittances to the appellees. During all of this time appellant rendered no account, and made no settlement of any kind. A continuous and frequent correspondence was kept up between the parties—on the part of appellees, chiefly demanding money and urging the business forward to a conclusion, and on the part of the appellant excusing his tardiness and promising to make remittances.

In 1898, in response to demands for information and for a settlement, appellant rendered his first account, covering the entire period of his agency and involving innumerable items. This statement of his transactions as agent for the appellees brought the latter in debt to the appellant in the sum of \$177.54. Shortly after this account was rendered, appellees placed the matter in the hands of counsel, who filed the bill in this cause

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asking for a discovery, and a proper settlement of the accounts of appellant as their agent, charging that he had not rendered a correct account, and had failed to make proper returns of the collections made by him.

The record clearly shows this allegation of the bill to be well founded. The result of the litigation was a decree in favor of the appellees for \$377.54, with interest from October 4, 1898, the date of the termination of the agency.

The demurrer to the bill was properly overruled. There is no merit in the contention that equity is without jurisdiction. This is not a case of a single money demand which might be enforced in a court of law, nor indeed of mutual demands merely, but it is a case involving a trust. It involves a complicated settlement of the accounts of an agent occupying a position of trust and confidence, where a discovery is called for and necessary, and the remedy, if any at law would be far from plain, simple and free from difficulty. The jurisdiction of a court of equity in such a case is well established. *Simmons v. Simmons' Admr.*, 33 Gratt. 451; *Thornton v. Thornton*, 31 Gratt. 212; *Coffman v. Sangston*, 21 Gratt. 263; *Segar v. Parish*, 20 Gratt. 680; *Zetelle v. Myers*, 19 Gratt. 62.

We are further of opinion that there was no error in the action of the court in refusing to apply the statute of limitations relied on by appellant. As a general rule, when there is an undertaking or agency which requires a continuation of services, the statute of limitations does not begin to run until the termination of the undertaking or agency. *Wood on Limitations* (Ed. 1883), sec. 123; *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 545; *Riverview Land Co. v. Dance & Co.*, 98 Va. 238, 35 S. E. 720.

There is nothing in the facts of the case to take it from under the influence of the general rule mentioned. The services of appellant were continuous under the power of attorney from 1881 to 1898 when the relation of agent was ended, and he had not then completed the work for which he was appointed,

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for part of the real estate was still unsold. His principals lived in a distant State where they could give no personal attention to the matter, necessitating reliance by them upon him for a faithful discharge of the trust he had assumed as their agent. The record shows that the transactions of the appellant were very numerous, involving a long and complicated account, the details of which were known alone to him. The case is clearly one governed by the general rule, where the statute does not begin to run until the termination of the undertaking or agency.

Upon the whole case, we are of opinion that there is no error in the decrees appealed from, and they must be affirmed.

Affirmed.

Statement.

Staunton.**BLACK'S ADMINISTRATOR v. VIRGINIA PORTLAND CEMENT CO.**

September 21, 1905.

1. **MASTER AND SERVANT—Assumed Risks—Negligence of Master.**—A servant, by implication, assumes the ordinary risks incident to the service in which he engages, but not those risks which may be obviated by the master by the exercise of reasonable care on his part. A failure on the part of the master to observe, for the protection of his servant, that reasonable degree of care which the circumstances of the particular case justly demand is actionable negligence, and is not within the influence of the doctrine of assumed risks.
2. **DECLARATION—Case at Bar—Personal Injury—Safe Place—Defences.**—A declaration which states that the plaintiff was in the employment of the defendant, who was engaged in quarrying rock, that the defendant, whose duty it was to keep its quarry in a reasonably safe condition, knowingly permitted a stone to remain in a position from which it was liable to fall at any time, and that it did fall, on a day stated, upon the plaintiff, who was ignorant of the danger, and in the exercise of due and proper care, and caution, by reason of which the injury complained of was inflicted, is good on demurrer. If the defendant relies upon the fact that the place was one in which the conditions were constantly changing, and that the preparation of it was a part of the work of the plaintiff, or that the danger was open and obvious, these are matters of defence to be established by proof.

Error to a judgment of the Circuit Court of Augusta county, in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

Braxton & Wayt and Curry & Glenn, for the plaintiff in error.

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Patrick & Gordon, for the defendant in error.

KEITH, P., delivered the opinion of the court.

This is an action of trespass on the case in which the administrator of George H. Black, deceased, sues the Virginia Portland Cement Company for injuries resulting in the death of his intestate.

The declaration shows that George H. Black was, when injured, in the employment of the Portland Company, engaged in getting out rocks from its quarry, and, after stating in general terms the obligation of the company to its servants, proceeds as follows: "It was particularly the duty of the said defendant company to keep and maintain the walls and sides of its said quarry, which walls and sides were of great height and very abrupt, clear of loose rock or of such rock and stones as were liable to fall down and injure or kill its servants while at work in said quarry; and said plaintiff says that the said defendant disregarded its duty in this behalf, and carelessly and negligently failed to keep its said quarry in a reasonably safe condition, and left rocks or stones in the walls or sides of said quarry loose and in such a condition that they were liable to fall from their places on said defendant's servants, while they were at work in the said quarry, for said defendant, for hire; and said defendant carelessly and negligently left a certain rock or large stone in such condition in the wall or side of its quarry, that it was liable at any time to fall out of its place and down upon the servants of the said defendant while they were at work in the said quarry, for hire, and to injure and kill them, and of all of which the said defendant had notice, and especially had notice of the dangerous condition of the said rock or large stone, and the dangerous condition of the said quarry, and the danger from the said rock or stone was unknown to the said plaintiff's intestate, George H. Black. And said plaintiff says that at the time aforesaid, to-wit: on the

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11th day of January, 1904, while his said intestate, George H. Black, as a servant for hire, of the said defendant company, was at work in the said quarry in the course of his employment, not knowing the danger, and while in the exercise of due and proper care and caution on his part, the said rock or stone fell from its place from the wall or side of said quarry, to-wit, a great distance, and with great force, and struck him, the said George H. Black, and severely bruised, injured and crushed him, so that by reason thereof he died."

The defendant company appeared and demurred to this declaration, and upon the demurrer judgment was rendered in its favor; and thereupon the plaintiff obtained a writ of error from this court.

It is true that a workman or servant on entering into an employment, by implication agrees that he will undertake the ordinary risks incident to the service in which he is to be engaged. But it is also true that a servant does not assume any risk which may be obviated by the exercise of reasonable care on the master's part. Labatt on Master and Servant, secs. 1 and 2.

Negligence, in a legal sense, is "failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. Cooley on Torts, p. 630.

Any failure upon the part of the master to observe for the protection of his servant that reasonable degree of care which the circumstances of the particular case justly demand is actionable negligence, and is not within the influence of the doctrine of assumed risks.

The declaration before us states that the plaintiff's intestate was in the employment of the Cement Company, engaged in quarrying rock; that the defendant company, whose duty it was to keep its quarry in a reasonably safe condition, knowingly permitted a stone to remain in a position from which it was

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liable to fall at any time and that in fact it did fall on the day stated upon George H. Black he being ignorant of the danger and in the exercise of due and proper care and caution, by reason of which he received injuries which resulted in his death. It would seem beyond dispute that this state of facts disclosed actionable negligence upon the part of the defendant in error. Every fact here stated is upon demurrer to be taken as true,—that the rock which inflicted the injury was in a position from which it was liable to fall; that the master knew this fact, and negligently permitted it to remain; and that the servant, ignorant of the situation, remained at work in the quarry in the due course of his employment, and, while in the performance of his duty, received the fatal injury. If these facts be established a case of negligence is made out which entitles the plaintiff in error to a recovery.

The view of the case urged by counsel for the Cement Company is that the employee in this case was working in a place in which the conditions were constantly changing, and the preparation of which was in itself part of the work of the employees, and not a place furnished by the master for its employees within the spirit of those decisions which delegate to the master the duty of providing for the servant a safe place to work. *Labatt on Master and Servant*, sec. 612a, note 10.

This would seem to be a matter of defense. If it should be made to appear to the jury that the accident arose from the changing and shifting conditions of the quarry, resulting from its operation, of which the master was not informed and which he could not be reasonably expected to have known, or if it were the result of an open and obvious danger of which the plaintiff in error had knowledge or of which in the exercise of ordinary care he should have known it may be that in these cases, and perhaps in others which could be suggested, the defendant in error would be entitled to a verdict. But such is not the case stated in the declaration.

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We are of opinion that the declaration under consideration sets out a good cause of action, and that the judgment of the Circuit Court sustaining the demurrer was erroneous.

Reversed.

Statement.

Staunton.

SCOTT AND OTHERS v. PATTERSON'S ADMINISTRATOR.

September 21, 1905.

1. *WILLS—Case in Judgment—Ultimate Fee Simple—Liability for Debts.*—A testator in the first clause of his will devised his estate to his wife for life, for the use of herself and certain of their children. The second clause of his will is as follows: "Secondly. After the death of my wife, I direct that my entire estate, both real and personal, without sale or appraisement, pass into the hands of the above-named children, or such of them as remain on my property for the period of twenty-five years, unless they elect to divide sooner; then, after the expiration of twenty-five years, or at the time my children elect to divide, should they so elect, then I direct that my entire estate, both real and personal, be equally divided between all of my children." After the death of the wife, creditors of some of the children sought to subject their interests in the property to the payment of their debts.

Held: The will invested the children with the ultimate fee-simple in remainder after the death of their mother, and the same is liable, as an incident of such estate, for the payment of their debts. If it was the intention of the testator to place the property beyond the reach of the creditors of the devisees, such intention cannot be carried into effect.

Appeal from a decree in chancery of the Circuit Court of Augusta county. Decree in favor of complainant. Defendant appeals.

Affirmed.

The opinion states the case.

Curry & Glenn, for the appellants.

Kerr & Ker and *Patrick & Gordon*, for the appellee.

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KEITH, P., delivered the opinion of the court.

So much of the case presented by the record as is necessary for us to consider is as follows: Certain creditors of W. B. Scott and Emma Scott filed their bill in the Circuit Court of Augusta county to subject their interests in certain real estate derived from their father, Robert Scott, to the payment of their debts. In the progress of the cause it was found that certain other persons, sisters of W. B. Scott and Emma Scott, among them Sallie Scott, were interested in the litigation and they were made parties. It appears that Robert Scott, by his will, bequeathed his entire estate, both real and personal, to his wife, Hester V. Scott, "to be hers for her use, and that of our children, viz: Sallie Scott, Harriet Ann Scott, Martha Emma Scott, William B. Scott and Estaline Scott, or such of them as remain on my property during my wife's lifetime, without appraisement or sale. Secondly. After the death of my wife, I direct that my entire estate both personal and real, without sale or appraisement, pass into the hands of the above named children, or such of them as remain on my property for the period of twenty-five years, unless they elect to divide sooner; then after the expiration of twenty-five years, or at the time my children elect to divide, should they so elect, then I direct that my entire estate, both real and personal, be equally divided between all my children."

The Circuit Court, after ascertaining through a commissioner the amount of debts and liens, and the order of their priority, decreed that the interests of William B. Scott, Emma Scott, and Sallie Scott, be sold, and the proceeds applied to the satisfaction of the debts proved against them, and from that decree an appeal was allowed.

The widow of Robert Scott, the testator, is dead, and the contention upon the part of appellants is that the second clause of the will by which, after the death of his wife, the testator directs that his entire estate, both real and personal, shall,

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without sale or appraisement, pass into the hands of his children, or such of them as remain on his property for the period of twenty-five years, unless they elect to divide sooner, is an executory limitation for the benefit of the children or such of them as elect to remain upon the land after the death of his widow, and cannot be subjected by the creditors of any one of them.

On behalf of appellees it is insisted that if the second clause of the will be an executory devise, it is void as creating a perpetuity, because the rule against perpetuities requires that the estate must vest within the life or lives in being and twenty-one years and ten months thereafter, whereas in this case the twenty-five years might by possibility extend beyond the life or lives in being and twenty-one years and ten months thereafter; that the will creates a life estate in the wife, and a vested remainder in her children, and that the interest with which the testator undertook to clothe his children for a term of years after the death of his wife merged in the remainder and created a fee simple; in other words, the remainder swallowed the term of years.

We do not propose to enter that field of unending discussion and controversy to which we are invited. We shall not vex ourselves with the niceties of executory devises, and contingent and vested remainders, but shall content ourselves with deciding what seems to be a very obvious proposition, that the will invested the children with an ultimate fee simple in the property in remainder after the death of their mother; that an inseparable incident of such an estate is liability for debts; and we can sanction no construction of the provision with respect to the interests of the children, or any of them, in this property for the period of twenty-five years the effect of which would be to exonerate it from this obligation. *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944.

It will be observed that the will nowhere in express terms

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undertakes to place this property beyond the reach of the creditors of the devisees. It is asserted that such was the intention of the testator in providing that it should pass into the hands of his children, or such of them as remained on the property for the period of twenty-five years, unless they elected to divide the same; but if such were the intent of the testator it cannot be carried into effect.

We are of opinion that the decree of the Circuit Court should be affirmed.

Affirmed.

Statement.

Staunton.**BERRY'S EXECUTRIX v. FISHBURNE & OTHERS.**

September 21, 1905.

1. **VENDOR AND PURCHASER—Sale by the Acre—Case in Judgment.**—Where a vendor's agent, in negotiating the sale of a tract of land, in response to an enquiry of the vendee, represents the tract to contain 179 acres, and offers to have it surveyed if desired, and the deed from the vendor describes the tract as containing 179 acres, more or less, this is a sale by the acre, and not in gross. For the principles governing the subject of such sales, see the opinion of the court.
2. **ESTOPPEL IN PAIS—Burden of Proof—Case in Judgment.**—Estoppels in pais are not to be taken by argument or inference, but must be certain to every intent. The burden of proof rests upon the party relying upon an estoppel, and it must be made to appear affirmatively by clear, precise and unequivocal evidence. In the case at bar, the evidence as to statements made by the maker of certain bonds, before their assignment, is not sufficient to establish an estoppel upon him to deny liability on said bonds.

Appeal from a decree in chancery of the Circuit Court of Augusta county. Decree in favor of defendants. Complainants appeal.

Reversed.

The opinion states the case.

J. M. Perry, for the appellants.

Fitzhugh Elder and *H. H. Blease*, for the appellees.

WHITTLE, J., delivered the opinion of the court.

Opinion.

This is a suit in equity brought originally by Abram Berry against his vendors and others, the appellees, for an abatement in the purchase price of the land in the bill and proceedings mentioned on account of a deficiency therein of 21½ acres. Pending the litigation, Berry died; and, the cause having been revived in the name of his executrix and heirs at law, the decree under review was passed dismissing the bill with costs.

The deficiency in the land is established beyond controversy, so that the main question presented by the record for decision is whether the sale was a sale by the acre or a sale in gross. If the former, appellant, the executrix, would be, in that aspect of the case, entitled to the abatement demanded; otherwise, she would not be so entitled.

The principles governing the subject of such sales have been settled in this jurisdiction by a long line of decisions. In the case of *Benson v. Humphreys*, 75 Va. 196, they are summarized as follows:

“First. Every sale of real estate where the quantity is referred to in the contract, and when the language of the contract does not *plainly* indicate that the sale was intended to be a sale *in gross*, must be presumed to be a sale per acre.

“Second. The language ‘more or less,’ used in contracts for sale of land, must be understood to apply only to small excesses or deficiencies, attributable to variations of instruments of surveyors, etc. When these terms are used it rather repels the idea of a contract of hazard, and implies that there is no considerable difference in quantity.

“Third. While contracts of hazard are not *invalid*, courts of equity do not regard them with favor. The presumption is against them, and while such presumption may be repelled, it can only be effectually done by clear and cogent proof.

“Fourth. The burden of proof is always upon a party asserting a contract of hazard; for the presumption always being in favor of a sale per acre, a sale in gross or contract of hazard must be clearly established by the facts.

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"Fifth. Where the parties contract for the payment of a *gross sum* for a tract or parcel of land upon the estimate of a given quantity, the presumption is that the quantity influences the price to be paid, and that the agreement is not one of hazard.

"Sixth. Whether it be a contract in gross or for a specific quantity depends, of course, upon the intention of the contracting parties, to be gathered from the terms of the contract and all the facts and circumstances connected with it. But in interpreting such contracts the court, not favoring contracts of hazard, will always construe the same to be contracts of sale *per acre*, wherever *it does not clearly appear* that the land was sold by *the tract*, and not by *the acre*. See *Watson v. Hoy*, 28 Gratt, 698, where all the cases decided by this court and many others are carefully collected in the elaborate opinion of Judge Burks."

See also to the same effect the subsequent cases of *Cunningham v. Miller*, 82 Va. 530; *Trinkle v. Jackson*, 86 Va. 238, 9 S. E. 986, 4 L. R. A. 525; *Boschens v. Jurgens*, 92 Va. 756; 24 S. E. 390; *Hull v. Watts*, 95 Va. 10, 27 S. E. 829.

The evidence in the case has received careful consideration, and without discussing it in detail it is sufficient to remark that it fails to afford the *clear and cogent proof contemplated by the authorities*, and strongly tends to sustain the theory of appellant, that the sale was *by the acre* and not in gross. This is not only true of the antecedent parol contract of sale, entered into between the agent of the vendors and the vendee, but also finds corroboration in the language of the deed subsequently executed by the parties in consummation of that contract. There is no doubt about the fact that this agent, in response to the direct inquiry of the vendee, represented that the tract contained 179 acres of land, and likewise offered to have it surveyed if desired—an avowal and offer, be it observed, that contribute to disprove the assumption that the sale was in gross, and that acreage was no inducement to the purchase.

The deed, after reciting the consideration of \$6,200, con-

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veys, "that certain tract or parcel of land . . . containing one hundred and seventy-nine acres, more or less, adjoining the lands of A. P. Anderson," etc. This description is substantially the same as that in *Benson v. Humphreys, supra*, which was held to constitute a sale *by the acre* and not a sale *in gross*. We have no difficulty, therefore, in resolving the first proposition in favor of the appellant.

But it is insisted, in the second place, that appellant is estopped by declarations of Berry from demanding an abatement of the bonds representing the deferred installments of purchase money.

Two of these bonds were assigned to Palmer, a stranger to the sale, and the remaining two to Loa A. Fishburne, one of the vendors. These parties allege in their answers that they were induced to purchase the bonds by the conduct of Berry; that his action and statement that he had no objection to their transfer, whether so intended or not misled them; and if allowed an abatement of the purchase price it would enure to his advantage and their disadvantage.

In that connection it appears that Berry had gone to the office of counsel for the vendors, in the city of Staunton, to call attention to the shortage in the land made known to him by a recent survey. He there met with several of the vendors, who had assembled for the purpose of completing a sale and assignment of the bonds to Palmer and Loa A. Fishburne. There is serious conflict in the testimony of witnesses as to what Berry said on that occasion in regard to the transfer of the bonds—varying in purport from an unqualified statement that he had no objection to the proposed assignment, to the qualified declaration, that "it was hard to pay for land and not get it, but that if he could not help himself they might dispose of the bonds." It was also proved that counsel advised Palmer and Loa A. Fishburne that Berry might contend for a rebate, but, in his opinion, he was not entitled to it as he had bought in gross and not by the acre. Neither Palmer

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nor Loa A. Fishburne was examined to sustain the affirmative allegations of their answers; and the extent to which they may have been influenced, if at all, by the statement of Berry is altogether matter of conjecture and inference.

As remarked in a recent case by this court, "The authorities uniformly hold that estoppels *in pais* are not to be taken by argument or inference, but must be certain to every intent. The burden of proof rests on the party relying upon an estoppel, and it must be made to appear affirmatively by clear, precise and unequivocal evidence." *Newport News, &c. Co. v. Lake*, 101 Va. 334-343, 43 S. E. 566; *Bolling v. Mayor of Petersburg*, 3 Rand 563; *Taylor v. Cusson*, 90 Va. 40, 17 S. E. 721.

Tested by the foregoing rule, it is apparent that the evidence relied on for that purpose, is insufficient to establish the precise facts upon which the alleged estopped is based.

For the foregoing reasons, the decree of the Circuit Court is erroneous and must be reversed, and the cause remanded for such further proceedings as may be proper in accordance with this opinion.

Reversed.

Syllabus.

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MIDDLE STATES LOAN, BUILDING AND CONSTRUCTION COMPANY

v.

MILLER'S ADMINISTRATOR.

September 21, 1905.

1. CONFLICT OF LAWS—*Place of Performance—Building Association.*—

Where the by-laws of a non-resident Building Association provide that all dues from members shall be payable at the home office of the company, which is outside of this State, a contract by a member for a loan, which is silent as to the place of payment, is a foreign contract, and is governed by the laws of the State in which the home office is located as to its validity, interpretation and effect.

2. BUILDING ASSOCIATIONS—*Borrowing Member—Usury—Foreign Law.*—

A contract of a borrowing member of Building Association to pay six *per cent.* interest on the money borrowed during the continuance of the loan, and the taxes and insurance premiums on the property conveyed to secure the repayment of the loan, in addition to what he undertook to pay as a stockholder to mature his stock, is not usurious under the laws of Maryland, where the dues are payable; and the contract will be upheld in this State when its enforcement is sought here.

3. BUILDING ASSOCIATIONS—*Borrowing Member—Withdrawal—Mode of Settlement—Foreign Law—Enforcement Here.*—

Under the laws of Maryland, which, in this case, will be enforced in this State, the amount due on the contract in suit (which is a bond given to a Building Association by a borrowing member who has since died) is to be ascertained by charging the estate of the borrowing member with the amount of the loan to him as of its date, and interest at six *per cent.*, and crediting his estate with all sums paid on the loan as of the dates of payment, whether principal or interest, and thus ascertain the balance due on the loan at the time of borrower's death. Upon this sum there should be credited the with-

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drawal value of the borrower's shares of stock at the time of his death, ascertained according to the by-laws of the company, then in force for determining the withdrawal value of the stock of a borrowing member who pays back a loan in advance of the maturity of his stock. For the balance thus ascertained, with interest thereon from the time of borrower's death, and unpaid fines assessed against him in his lifetime, and the taxes paid by the company on the trust property, with interest thereon from date of payment, the company is entitled to a decree.

Appeal from a decree of the Circuit Court of Rockingham county, in the chancery suit of *Miller's Adm'r v. Miller's Heirs*, wherein appellant asserted a debt. There was a decree fixing the amount of appellant's debt at a less sum than it deemed it was entitled to, and from that decree this appeal was taken.

Reversed.

The bond in the suit, which is set out in the opinion of the court, fixes no place of payment, but sec. 6 of art. IV of the by-laws of appellant company declares that "all money due from members to the company . . . shall be payable at the home office in Hagerstown, Md." The other facts sufficiently appear in the opinion of the court.

Conrad & Conrad, for the appellant.

Sipe v. Harris, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

In June, 1891, J. G. H. Miller, of Rockingham county, became a member of the Middle States Loan, Building and Construction Company, of Hagerstown, Maryland. In October of that year, he borrowed from the company three thousand dollars, a sum equal to one-half the face value of the sixty shares of stock for which he was then a subscriber. At the time the loan was made he and his surety executed a bond in the following words:

"Know all men by these presents: That we, J. G. H. Miller

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and S. P. H. Miller of Rockingham county, and State of Virginia, are indebted unto the Middle States Loan and Construction Company, of Hagerstown, Maryland, in the sum of three thousand dollars, being the amount of a loan this day received by J. G. H. Miller from said company, with interest thereon from this date, payable monthly.

"Now the condition of the above obligation is such that if J. G. H. Miller and S. P. H. Miller or either of them shall pay the interest monthly on said sum of three thousand dollars received by J. G. H. Miller as aforesaid and shall make the monthly payments monthly on sixty shares of stock of said company subscribed for by J. G. H. Miller in said company, and any and all fines assessed against J. G. H. Miller's sixty said shares of stock, and shall likewise pay, when due, the taxes against the property conveyed by deed of trust to secure the payment of said loan of \$3,000.00, and the premiums necessary to keep the buildings on said property insured from loss by fire, in such sum as the said company may require (not exceeding \$——) until the said stock subscribed by J. G. H. Miller as aforesaid becomes fully paid in and of the value of one hundred dollars per share, then it is understood that upon the surrender of said stock to said company, this obligation shall be deemed fully paid and cancelled. But if J. G. H. Miller or S. P. H. Miller fails to pay when due and payable the said taxes and insurance premiums, or make default in the payment of said monthly interest, fines, and monthly payments on said stock for a period of six months after the same are or any installment thereof is due, then, at the option of said company, the whole indebtedness evidenced by this obligation (including any taxes and insurance premiums due or paid by said company) shall at once become and be due and collectable.

"Witness our hands and seals this 6th day of October, 1891."

To secure the payment of this bond Miller executed a deed of trust on certain real estate. He made payments from time to time on the dues payable on his stock, on fines assessed against

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him, and upon the interest and principal of the loan. On June 9, 1899, he died. Within a short time after his death his personal representative instituted a suit to have his estate administered under the direction of the court. In that case the company asserted its bond against Miller's estate, claiming that there was due it, after all proper credits had been allowed, the sum of \$2,602.59, as of August 21, 1899.

After several references, the commissioner to whom the matter was referred reported the amount due the company to be \$596.40 as of April 2, 1904, of which sum \$415.15 was principal. This report was confirmed by the court. From that decree the company applied for and obtained this appeal.

Several errors are assigned, but they only involve two questions—one whether the court erred in holding that the contract was a Maryland contract, and was governed by the laws of that State, and the other whether the court erred in ascertaining the true balance due the company from Miller's estate.

Under the decisions of this court in the cases of *Building Asso. v. Ashworth*, 91 Va. 706, 22 S. E. 521; *Nickols v. Peoples Asso.*, 93 Va. 380, 25 S. E. 8; and *Ware v. Bankers, &c. Co.*, 95 Va. 680, 29 S. E. 744, 64 Am. St. Rep. 826, upon the facts of this case, it is clear that the contract in question must be treated as a Maryland contract, and be governed by the laws of that State as to its validity, interpretation, and effect, and that the Circuit Court did not err in so holding.

Treating the contract as a Maryland contract, was the method adopted in the Circuit Court for ascertaining the balance due the appellant company correct?

While the laws of the State of Maryland, which are to guide this court in passing upon the contract in question, have not been proved in the usual manner, counsel on both sides cite us to and rely upon decisions of the Supreme Court of the State of Maryland as furnishing the law by which the validity and effect of the contract is to be determined, and this seems to have been the course pursued in the Circuit Court.

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The commissioner who made the final report upon the appellant company's claim, which was confirmed by the Circuit Court, was of opinion that under the decision of the Supreme Court of Maryland in the case of *White v. Williams*, reported in 45 Atl. Rep. 1001, the contract under consideration was usurious, and treating it as such ascertained the balance due the appellant company in accordance with the rule adopted in that case, as he construed that decision.

There is a marked difference between the contract construed in that case and the contract under consideration. By the terms of the former, the borrowing member was not only required to pay to his company, the Baltimore Building and Loan Association, the monthly dues as they accrued on his stock and such fines and penalties as might be assessed against him under the by-laws of the association, and six *per cent.* interest on the money borrowed by or advanced to him, but he was also required to pay, during the continuance of the loan, a premium of \$7.50 monthly. This charge of \$7.50 per month in addition to the charge of legal interest on the money advanced it was held could not be sustained as premium, and that it was "simply something to be paid for the advance or loan of money in excess of legal interest, which is usury."

The contract involved in this case only requires the borrowing member to pay six *per cent.* interest on the money borrowed by him during the continuance of the loan, and the taxes and insurance premiums on the property conveyed to secure the repayment of the loan, in addition to what he undertook to pay when he became a member of the company and which he was bound to pay to mature his stock although he never became a borrowing member. Such a contract is not usurious under the laws of the State of Maryland, as we understand the decision of the Supreme Court of Maryland in the case of *Middle States Loan, Building & Construction Co.* (the appellant) v. *Hagerstown Mattress, &c. Co.*, reported in 33 Atl. Rep. 886-889, in

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which it construed a contract of the same building association containing substantially if not identically the same provisions as the contract construed in this case, so far as they affect the question now under consideration.

The borrower in that case desired to take advantage of the provisions of sec. 5, art. 6, of the by-laws of the association, which gave him the right to repay the loan at any time after giving thirty days' notice. The notice was given, but, a controversy having arisen as to the amount necessary for the repayment of the loan, he instituted suit to have that question determined. In ascertaining what amount was still due from the borrower, the court said: "A borrower can never, in this State, be required to pay in satisfaction of an ordinary loan more than the principal and six *per cent.* interest *per annum* thereon. Therefore, if this amount should be paid by the mortgagor in this case, the debt would be discharged. But the mortgagor is not only a debtor, but is also a stockholder in the building company; and after the payment of the debt it would still be a stockholder and would still have all the rights and be liable to all the obligations attached to the ownership of stock. By the by-laws it would have the right to withdraw its stock, according to certain terms, which will be hereafter explained. Although not stated in so many words, it is evident that it is the purpose of the mortgagor to settle and conclude all its business with the mortgagee, and to dissolve all connection between them. It is proper to settle in this suit all questions between the parties growing out of their dealings with each other on the subject of this loan. We must, therefore, determine what amount the mortgagor is bound to pay to the mortgagee, and what amount he is entitled to receive on the withdrawal value of its shares." After discussing certain provisions of the by-laws for ascertaining the withdrawal value of stock, the court reached the conclusion that "the mortgagor must be charged with the loan of \$5,000, with interest thereon down to the filing of the bill of complaint; and it is to be credited with its payments into the

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loan found, to-wit: 50 cents a month on each of its shares, with interest on each payment from the time it was made down to the institution of this suit. For the amount thus ascertained to be due the mortgagee is entitled to a decree with interest thereon until paid."

While the borrowing member in that case was a corporation and a going concern and voluntarily offered to repay the money borrowed, and in this case the borrowing member is dead, his personal representative is entitled to all the advantages the decedent would have had upon a voluntary withdrawal, or upon his paying back in advance of the stipulated time the money loaned him. Endlich on Bld'g Asso. (2nd Ed.), secs. 57 and 148; *Hansel v. International, &c., Co.* (Tex. Sup.), 20 S. W. Rep. 116.

We are of opinion, therefore, that the proper method of ascertaining the balance due from Miller's estate on the claim asserted against it by the appellant company is to charge Miller's estate with the amount of the loan as of the 6th day of October, 1891, and six *per cent.* interest, and to credit his estate with all sums paid on the loan as of the date of such payments, whether of principal or interest, and thus ascertain the balance due on the loan at the time of Miller's death. Then to credit upon that sum the withdrawal value of Miller's shares of stock at the time of his death, ascertained in accordance with the by-laws of the company in force at the time of his death for determining the withdrawal value of the stock of a borrowing member who pays back in advance of the maturity of his stock the money loaned him. For the amount thus ascertained to be due on the loan, with interest thereon from the time of Miller's death until paid, the fines assessed against him during his lifetime remaining unpaid, and the taxes paid by the appellant on the trust property with interest thereon from the date of payment until paid, the appellant will be entitled to a decree.

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The decree appealed from must be reversed, and the cause remanded for further proceedings, to be had in accordance with the views expressed in this opinion.

Reversed.

Statement.

Staunton.

CLARK V. ROLLER.

September 26, 1905.

1. **DEEDS—Description of Premises—Doubts Resolved against Grantor—Case at Bar.**—Under a grant to A. of all and every part of a certain tract of land, which was conveyed to grantor by S. by a deed bearing a date mentioned, and recorded in a deed book specified, "to which the said grantor has legal title under the conveyances from Coleman and Haviland, the original patentees of the larger tract of land, of which said tract forms a part, the same having been described and conveyed in the said deed to the" grantor as containing by survey May 4, 1891, three hundred and ninety one acres and 38 poles, A. takes the entire tract of 391 acres and 38 poles conveyed to his grantor, and the language quoted from the old deed does not restrict the conveyance to only so much of the tract as was actually within the limits of the old grant of Coleman and Haviland, and was not intended to describe the interest or amount of land conveyed, but was used for the purpose of showing from This construction would have to be placed on the deed to A. even what source the land was derived, and as a help to trace the title. If the language left it in doubt, as, in such case, the language is construed most strongly against the grantor.

Error to a judgment of the Circuit Court of Rockingham county, in a caveat entered by Clark against Roller. Judgment for defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

C. R. Wingfield and G. G. Grattan, for the plaintiff in error.

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John E. Roller, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

The plaintiff in error entered a caveat against the issuing of a grant to the defendant for a small parcel of land lying in Rockingham county. Upon the trial of the cause, there was a verdict and judgment in favor of the defendant. To that judgment this writ of error was awarded.

To sustain the issue upon his part the plaintiff introduced in evidence certain deeds through which he claimed title or color of title to the land in controversy. Among these was a conveyance from his immediate grantor, dated June 12, 1903, the proper construction of which is raised by the first assignment of error.

The Circuit Court was of opinion that the deed did not embrace and therefore did not give the plaintiff color of title to the land in controversy.

So much of the deed as is necessary to determine whether or not the court properly construed it, is as follows:

"Witnesseth, that for and in consideration of one thousand dollars (\$1,000.00), paid as hereinafter set forth, the said Howard H. Hall and Annie M., his wife, do grant and convey with general warranty unto the said R. S. Clarke all and every part of that certain tract of land, lying in Brock's Gap, in said county of Rockingham, which was conveyed to the said Howard H. Hall by J. M. H. Stover by deed bearing date on the 26th day of March, 1894, and admitted to record on the 7th day of April, 1894, in the clerk's office of the County Court of said county of Rockingham, and recorded in deed book number 48, page 487, &c., to which the said Howard H. Hall has legal title under the conveyances from William Coleman and Horatio Gates Haviland, the original patentees of the larger tract of land, of which said tract forms a part, the same having been

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described and conveyed in said deed to the said Howard H. Hall from the said J. M. H. Stover as containing by survey of May 4, 1891, three hundred and ninety-one acres (391) and thirty-eight (38 P). . . .”

The contention of the plaintiff is that the deed operated to convey to him all and every part of the land which Hall, his grantor, obtained title to under his conveyance from Stover, and that the reference to the Coleman and Haviland patent is mere matter of description or recital of the chain of title, and was not intended to limit the conveyance to so much of the Stover land as might be found to lie within the actual bounds of the old Coleman and Haviland patent, from which the title to the tract conveyed was supposed to be derived.

The defendant insists and the court so held, that the deed only conveys so much of the Stover tract of 391 acres and 38 poles as was actually covered by the old grant of Coleman and Haviland.

It is clear, we think, from the language of the deed, that the entire tract of 391 acres of land conveyed by Stover to Hall was conveyed by him to the plaintiff, and that the language of the old deed, viz.: “to which the said Howard H. Hall has legal title under the conveyances from William Coleman and Horatio Gates Haviland, the original patentees of the larger tract,” relied on by the defendant to show that only so much of the tract was intended to be conveyed as was actually within the limits of the old grant of Coleman and Haviland was not intended to describe the interest or amount of land conveyed, but was used for the purpose of showing from what source the land was derived, and as a help to trace the title. *Moran v. Somes* (Mass.), 28 N. E. 152-3; *Brown v. Heard* (Me.), 27 Atl. 182, 183. The language which precedes as well as what follows the words quoted negatives the construction contended for by the defendant. It shows clearly, we think, that Hall intended to convey and did convey the entire Stover tract, and that the Stover tract is a part of the old grant. But if the language

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of the deed left it in doubt whether the whole Stover tract or only so much of it as was actually embraced within the old grant was intended to be conveyed, that doubt would have to be solved in favor of the defendant, under that rule of construction which requires that where there is uncertainty or ambiguity in the language used in a deed, it shall be construed most strongly against the grantor and that the grantee shall have the benefit of such doubt or ambiguity. 2 Minors Inst. (4th Ed.); *Carrington v. Goddin*, 13 Gratt. 587.

There are other assignments of error, but as the rulings of the court complained of were based upon or controlled by its erroneous construction of the deed from Hall to the plaintiff, it is unnecessary to consider them as the questions involved in them are not likely to arise upon the next trial.

The judgment of the Circuit Court must be reversed, the verdict of the jury set aside and a new trial granted, to be had not in conflict with the views expressed in this opinion.

Reversed.

Statement.

Staunton.**RISQUE'S ADMINISTRATOR v. CHESAPEAKE & OHIO.
RAILWAY COMPANY.**

September 26, 1905.

1. **RAILROADS—Delivery of Defective Cars—Inspection—Injury to Servant of Receiving Company.**—If a railway company delivers, on a siding, to a company operating an iron furnace, cars without brakes, or with unsound brakes, in consequence of which defect a servant of the receiving company is injured, his remedy is against the receiving company only, whose servant he is, and whose duty it was to inspect the cars before use, and either decline to receive them or else remedy the defect. There is no relation of employer and employee between the delivering company and the person injured.
2. **RAILROADS—Joint Use of Grade Crossing—Contributory Negligence.**—Where the view of a grade crossing of a railroad and a furnace track is obstructed, the engineer of the furnace company who backs his locomotive onto the track of the railroad, with his back to the railroad, so that he can not see, at a time when he knows that a passenger train on the railroad is due and must pass over that point, cannot recover of the railroad company for injuries resulting from a collision with such passenger train, even if the servants in charge of such train were guilty of negligence in giving warning of its approach. His own contributory negligence bars recovery.

Error to a judgment of the Circuit Court of Rockbridge county, in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Opinion.

Hugh A. White, for the plaintiff in error.

Robert L. Parish, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This action was brought to recover damages for the alleged negligent killing of the plaintiff's intestate in a collision between an engine of the Alleghany Ore and Iron Company, which owns and operates the Buena Vista Iron Furnace, and a passenger train of the Chesapeake and Ohio Railway Company, at a crossing near Buena Vista.

There was a demurrer to the evidence, and a judgment thereon in favor of the defendant, and thereupon the case was brought to this court.

We are of opinion that the demurrer to the eighth and ninth counts of the declaration was properly sustained. These counts aver that the defendant railway company was guilty of negligence in furnishing the Ore and Iron Company cars without brakes, or with unsound brakes, to be handled upon its yards; and assume that this alleged negligence rendered the defendant liable to the plaintiff's intestate for any injury he may have sustained in the use of such cars.

The plaintiff's intestate was an employee of the Alleghany Ore and Iron Company. The declaration shows that the cars were delivered by the railway company to the Ore and Iron Company on a side tract, to be moved, and either unloaded of freight belonging to the Ore and Iron Company or loaded with the product of that company. If these cars were without brakes, or equipped with unsound brakes, it was the duty of the Ore and Iron Company to ascertain the fact by proper inspection, and either remedy the defect or decline to use the cars. No relation of employer and employee existed between the defendant company and plaintiff's intestate, and if he suffered any injury by reason of the cars in question being without brakes,

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or equipped with unsound brakes, the liability, if any, would rest upon his master, the Alleghany Ore and Iron Company, for failing to make proper inspection, and not upon the defendant railway company. *Baltimore & Potomac R. Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624; *Texas Pac. R. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188. See 20 Am. & Eng. Ency. Law, pp. 80-81, and 23 Id. 731.

We are further of opinion that the demurrer to the evidence was properly sustained. The Chesapeake and Ohio Railway Company's passenger train number 83 was approaching its Buena Vista station on schedule time. Five hundred and forty feet south of the station its main line is crossed by a track of the Alleghany Ore and Iron Company; said crossing being used by the latter company for delivering freight to and receiving it from the Chesapeake and Ohio and Norfolk and Western Railways. As the engine attached to the passenger train of the defendant company was passing over the crossing mentioned, the engine of the Ore and Iron Company backed upon it, striking the tender attached thereto and causing a wreck which resulted in the death of plaintiff's intestate. The Ore and Iron Company's yard, on which its engine was run before it reached the crossing was obstructed by box cars on the side track near the crossing, and by fog.

The defendant in error relies on several defenses, but as one is in our opinion conclusive of the case it is unnecessary to advert to others.

The plaintiff's intestate was the engineer in charge of the engine of the Ore and Iron Company, and at the time of the accident was engaged in shifting cars on the yard of his employer. While attempting to make what is called a flying switch, he backed his engine upon the defendant company's main line with his back to the railroad track, so that he could not see, and this at a time when he knew the defendant's passenger train was due at its Buena Vista station, and could not reach it except by

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passing over the crossing upon which he was backing his engine. Such negligence can only be characterized as reckless, if not wanton. If it were conceded that the defendant railway company was guilty of the negligence it is charged with, in approaching its Buena Vista station, the contributory negligence of the intestate disclosed by the record would preclude a recovery. *Pittsburg R. Co. v. Browning* (Ind. App.), 71 N. E. 227; *Kelly v. Duluth R. Co.* (Mich.), 52 N. W. 81.

The case last cited is very similar in its facts to that at bar, except that the case in judgment is much stronger for the defendant. After stating the facts in that case, the court says: "Both of these engineers were reckless. Both knew that there were no semaphores, flagmen, or gates at this crossing. The view of each was obstructed. It was the duty of each in the performance of his obligations to his employers, to see that the way was clear before attempting to make the crossing. A compliance with the statutory duty of stopping and giving the crossing signals did not relieve either from the duty of keeping his train under control, so that it could have been stopped in time to avoid the collision. The only difference in conduct was possibly in the rate of speed of the trains, but this does not excuse plaintiff in the neglect of a plain duty in the line of his employment. The trial judge was right in directing a verdict for the defendant, and the judgment is affirmed."

For these reasons the judgment complained of must be affirmed.

Affirmed.

Statement.

Staunton.

STOUT v. STOUT & OTHERS.

September 26, 1905.

1. RES JUDICATA—Final Decree—Failure to Appeal—Case in Judgment.—

The record in this case disclosed the fact that in a prior suit, under proper pleadings, with all necessary parties before the court, it had been finally determined by a competent court, with jurisdiction of the subject matter and the parties, that the appellant had only a life estate in the property which she now claims in fee. The decree so determining was final, and from it no appeal was taken, and to revive it no bill was filed, within the time prescribed by law. Her rights and interests were thereby irrevocably fixed and ascertained, and cannot now be changed by any court, original or appellate.

- 2. EQUITY—Final Decree—Leave to Reinstate.—**Where all matters involved in a cause have been fully and finally disposed of, and the cause has been retired from the docket, the reservation at the foot of the decree of leave to any party "to reinstate the cause and seek any proper relief at the foot of this decree" does not render the decree any less final than before, and was not intended to authorize any party to have the case reheard on its merits and former adjudications of the court set aside and annulled.

Appeal from decree in chancery of the Circuit Court of Augusta county. Decree in favor of complainants. One of defendants appeals.

Affirmed.

The opinion states the case.

Patrick & Gordon and Timberlake & Nelson, for the appellant.

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Bumgardner & Bumgardner, for the appellees.

HARRISON, J., delivered the opinion of the court.

The appellant seeks, by this appeal, to establish her right under the will of her late husband, John W. Stout, to a fee simple estate in a certain house and lot on Frederick street, in the city of Staunton.

We are met at the threshold of the appellant's claim with the contention that her interest in the house and lot mentioned has already been adjudicated, and held to be a life estate merely, and that all question touching her estate therein is now beyond the reach of further judicial inquiry. If this contention be well founded, it is obvious that the appellant cannot prevail in this court.

It appears from the record that in April, 1893, the executor of John W. Stout, deceased, filed his bill in the Circuit Court of Augusta county, asking that the will of his testator be construed, and that the rights of his widow in the estate, after paying debts and costs, be determined; the court being especially asked to say whether she took an absolute estate in the residuum, or an estate for life only, and if only an estate for life whether the property was to be turned over to her, or to be held by the executor as trustee. In response to the prayer of this bill all necessary parties, including the appellant, were brought before the court, and in May, 1893, a decree was entered containing, among others, the following provision: "And the court having maturely considered the will of John W. Stout, deceased, is of opinion and doth decree that Kate R. N. Stout, the widow of said decedent, is, under his will, entitled to receive for her use and support all of the estate of every kind of said decedent which remains after the payment of debts and the costs of administration, for her life; and what remains at her death is to pass under the will of said decedent to the children of William I. Stout. But the court is further of opinion that should said

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Kate R. N. Stout marry again, then Alexander F. Robertson, who in that event becomes a trustee of the estate, will reclaim said property or so much thereof as he can, and hold the same subject to the provisions of the will as provided in the event of the widow remarrying."

•This clause of the decree unquestionably declares that all of the estate which remains after the payment of debts and costs of administration is to be for the use and support of appellant *for her life*. It is true that after thus adjudging her estate to be one for life, the clause, following the language of the will, contains expressions calculated to confuse the court's meaning, but when the decree is carefully read in connection with the will, and especially when considered in connection with the subsequent proceedings in the cause, it is manifest that the court intended to declare, and did hold, that appellant only had a life estate under the will of her husband. This is shown by the decree of May 15, 1894, which authorizes the executor to borrow from the appellant a sum sufficient to pay off a balance of debt remaining unpaid after all of the estate, other than the house and lot in question, had been exhausted, and to secure the same by a lien in her favor upon the said house and lot. That the appellant understood the view of the court to be that she only had a life estate is shown by her petition filed in the cause December 1, 1894, asking that the cost of a tombstone she had erected over the grave of her husband should also be secured in her favor upon the house and lot together with the amount borrowed from her by the executor. In this petition she says, "the estate has been nearly settled up, and all of the indebtedness of the decedent paid save a balance of something over \$150.00, leaving to your petitioner out of the estate of said decedent, under the provisions of his will, *only the life estate* in the house and lot in the city of Staunton, where she at present resides." On the 6th of December, 1894, a decree was entered upon this petition, wherein it is said, "the court being of opinion that it is just and proper that the prayer of the petition of Mrs.

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Kate R. N. Stout should be granted . . . it is therefore adjudged, ordered and decreed that Mrs. Kate R. N. Stout have a lien, which is hereby established upon the house and lot . . . for the sum of \$272.24, without interest, during her life—the aggregate of the amount advanced to the executor as aforesaid and the cost of said monument, which lien can be enforced in this cause whenever she may be advised so to do.” This decree establishing a lien in favor of appellant upon the house and lot, in question, cannot be reconciled with the contention that she had theretofore been adjudged to be the owner of a fee simple in the property. The learned judge who entered that decree can hardly be supposed to have solemnly adjudged that appellant was entitled to a lien in favor of herself upon her own property, and to have provided that she might, whenever advised so to do, sell her own property to satisfy a lien thereon in favor of herself. Establishing this lien upon the house and lot is sufficient, without more, to show clearly that the court understood its previous action in the premises to be an adjudication that appellant was the owner of a life estate only.

This last mentioned decree of December 6, 1894, also declares in express terms that appellant was the owner of *a life estate*, as shown by the following concluding paragraph: “And all matters involved in this cause having been finally disposed of, except the said house and lot in which the widow of decedent has a life estate, and which she is now occupying as a residence, it is ordered that this cause be stricken from the docket, with leave reserved to any party thereto to reinstate the same and seek any proper relief at the foot of this decree.

Upon the whole record, it is clear that the court and the parties treated and dealt, throughout, with this matter upon the theory that the court had, in response to the prayer of the bill for a construction of the will, adjudged that appellant was entitled to a life estate merely in what remained of her husband’s estate after payment of his debts and the costs of administration.

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It only remains to consider the contention made for appellant, calling in question the finality of the decree of December 6, 1894.

As already seen, that decree in its concluding paragraph employs the following language: "And all matters involved in this cause having been finally disposed of, except the house and lot in which the widow of decedent has a life estate," etc. The record shows that the entire estate had been settled and every purpose for which the bill was filed accomplished. This is expressly declared to be the case by the decree, and the cause is retired from the docket, with leave reserved to any party thereto to reinstate the same and seek any proper relief at the foot of the decree. It is contended that the final clause of the decree, giving leave to any party to reinstate the same, shows that everything had not been done in the cause that the court intended to do, and that for this reason the decree was not final.

This position is not tenable. The record shows that the estate had been completely settled, leaving after payment of debts the house and lot involved in this controversy, subject to the lien established thereon in favor of the appellant. The leave reserved at the foot of the decree to reinstate the cause for proper relief was not intended to give any party thereto the right, at any time, to have the entire case reheard and the adjudications of the court set aside and annulled. The purpose was to enable appellant to exercise the right which had been reserved to her of enforcing in the cause the lien established in her favor upon the house and lot; and possibly to enable the trustee to administer the trust created by the will in the event appellant married again. If the cause could be reinstated for the purpose of again litigating the questions that had been decided, there would be no end to controversy. As said by Judge Phlegar in *Echols v. Brennan*, 99 Va. 150-154, 37 S. E. 786, "no man could ever know that litigation was certainly ended."

In *French v. Shoemaker*, 12 Wall. 86, 20 L. Ed. 270, the Supreme Court holds, that leave given to either party to apply

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at the foot of a decree for relief, as to any matter not fully determined, was a mere matter of precaution not affecting the finality of the decree. At page 98, the court says: "Leave, it is true, is given to either party to apply, at the foot of the decree, for such further order as may be necessary to the due execution of the same, or as may be required in relation to any matter not finally determined by it, but it is quite apparent that that reservation was superadded to the decree as a precaution, and not because the court did not regard the whole issue between the parties as determined by the decree."

The decree may be erroneous, but the error does not render it less final. The view taken by the court of the rights of appellant under the will of the decedent may be erroneous, but that error cannot now be corrected. The court has, by its order, put the cause beyond its control. There are but two ways known to the law by which such a decree could be set aside—by bill of review in the court which rendered it, or appeal to this court. Neither was resorted to in the time limited by statute, and it is now too late to recall the decree and resume a jurisdiction that has been exhausted. *Battaile v. Maryland Hospital*, 76 Va. 63.

For these reasons the decree appealed from must be affirmed.

Affirmed.

Syllabus.

Richmond.

NORTH BRITISH & MERCANTILE INSURANCE COMPANY

v.

EDMUNDSON.

November 23, 1905.

1. FIRE INSURANCE—*Policy—Construction—Substantial Compliance.*—
A substantial compliance with the requirements of a fire insurance policy, including the "iron safe clause", and the provisions as to proof of loss, is all that can be reasonably exacted.
2. FIRE INSURANCE—*Inventory—Proof of Loss—Conflicting Evidence.*—
Where the evidence is conflicting, it is for the jury to determine whether an inventory offered by the assured was accepted by the agent of the insurer as sufficient, and whether a proof of loss was furnished in a reasonable time and not later than sixty days prior to the end of twelve months from the date of the fire.
3. FIRE INSURANCE—*Proof of Loss—Effect of Failure to Furnish.*—
Where no forfeiture is provided for in case of a failure to furnish proofs of loss—forfeitures being provided in case of breach of other requirements—or furnishing proofs in the specified time is not expressly made a condition precedent to recovery, the effect of the failure to furnish such proofs is merely to postpone the time of payment to the specified time after they are furnished.
4. FIRE INSURANCE—*Proof of Loss—Waiver—Compliance with Policy.*—
Where an insurer is given informal notice of a total loss by fire, and appears on the ground for the purpose of ascertaining the facts as to the fire, etc., and negotiations follow with reference to the payment of the loss, but he takes no steps towards such payment, and, when a formal proof of loss is tendered nine months after the fire, points out no defects therein, but indicates a purpose to contest his liability, a jury is well warranted in finding either that there has been a waiver as to the proof of loss, or that there has been a substantial compliance with the requirement of the policy in that respect.

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5. **FIRE INSURANCE—Iron Safe Clause—Object—Books to be Kept.**—The object of the "iron safe clause" in a fire insurance policy is to protect the insurer against fraud by requiring that in case of the destruction of the property, the insured shall furnish a set of books which will present clearly and plainly a complete record of the business he has transacted while the policy was in force, and if the compliance with the requirement be sufficient to protect the insurer against fraud, it is all that can be reasonably demanded. In the case at bar there had been no purchases and but two small sales since the inventory, taken shortly before the policy was issued, and these sales were duly entered in the book containing the inventory, which was preserved and offered in evidence at the trial. The jury, deeming the book sufficient, found for the plaintiff, and their verdict was sustained in the trial court, and will not be set aside by this court.
6. **FIRE INSURANCE—Policy—Construction—Forfeiture.**—Courts, in construing policies of insurance, do not look for grounds of forfeiture, and, furthermore, will construe the language of policies strictly against the insurer and liberally in favor of the insured.

Error to a judgment of the Circuit Court of Federick county, in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Sipe & Harris, for the plaintiff in error.

Barton & Boyd and *Harry R. Kern*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This action was instituted by defendant in error to recover the amount alleged to be due upon a fire insurance policy issued by the plaintiff in error covering such losses as might be sustained by the insured in consequence of the destruction by fire of his stock of merchandise at Middletown, Virginia, embracing coffins, trimmings, instruments and other goods and merchandise used in an undertaking establishment.

The policy was underwritten August 21, 1902, for \$700.00

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on the insured's stock of merchandise to the value of \$650.00, and on office furniture and fixtures, including an iron safe, all in the same building, to the value of \$50.00. The value of the property burned was \$1,045.50, the fire occurring January 18, 1903. In an inventory made by the insured July 21, 1902, one month before the issuance of the policy, the property of the insured was of the aggregate value of \$1,410.75, but in the inventory there was a hearse and a set of furniture not covered by the policy.

A few days after the fire, in response to an informal notice of the fire to the agent of plaintiff in error at Winchester, Virginia, the said agent and the adjuster of plaintiff in error visited Middletown for the purpose of ascertaining the character and circumstances of the loss, taking at the time the paper known as a non-waiver agreement, with the view to avoiding any waiver of the rights of the parties growing out of such examinations as might seem necessary preliminary to an adjustment of the loss. A call was made by the adjuster upon the defendant in error for invoices for the original stock of goods, which he tried to get, but could not, and while there were some negotiations following, plaintiff in error took no steps to pay the loss, and this suit was instituted.

The defense made is on the ground that the terms of the policy were not complied with, especially the provision known as the "iron safe clause," requiring books which should "clearly and plainly present a complete record of business transacted, including purchases and sales made for cash and credit, from date of inventory," and that these books should be securely kept in an iron safe, or in some place not exposed to fire.

This defense was made under the general issue, and by a number of special pleas, on which the jury found against the plaintiff in error the amount claimed by defendant in error of \$700.00, with interest thereon from December 10, 1903; and to the judgment on the verdict this writ of error was awarded.

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Of the assignments of error made in the petition for the writ of error, only the third, fourth and fifth are relied on here.

The third is to the granting of the eight instructions offered by defendant in error, which are as follows:

(1) "The court instructs the jury that the law only requires from an insured person a substantial, and not necessarily a literal, compliance with the requirements of his policy, and if they believe from the evidence that the plaintiff in this case substantially complied with the requirements of the policy sued on, then they must find for the plaintiff the amount of his loss as proved by the testimony, not exceeding the sum of \$700.00 with interest from sixty days after the proof of loss. The said sum to be three-fourths the cash value of the stock not exceeding \$650.00, and three-fourths cash value of office furniture and fixtures and iron safe not exceeding \$50.00."

(2) "If the jury believe from the evidence that the defendant company waived any of the requirements or conditions of the policy sued on, then they are instructed that such waiver is equivalent to the performance by the plaintiff of such conditions as they believe were so waived."

(3) "If the jury believe from the evidence that the plaintiff offered to the defendant a proper proof of loss within a reasonable time, under all the circumstances of the case, after the fire, and not later than sixty days prior to the end of twelve months from the date of the fire, then they are instructed that such offer was in full time, even though it was made more than sixty days after the date of the fire."

(4) "The court instructs the jury that a substantial compliance with the requirements of the policy is all that is required in a proof of loss, and if the jury believe that the plaintiff in a reasonable time and more than sixty days prior to the end of twelve months after the fire, offered to the defendant such a proof of loss and that the defendant refused to accept the same,

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but failed to point out any alleged defects in the said proof of loss, then the defendant is to be taken to have waived the defects not so pointed out, and the right to require any further proof of loss."

(5) "If the jury believe from the evidence that an inventory substantially in accordance with the requirements of the policy, was made out by the plaintiff within twelve months prior to the date of the policy, then they are instructed that the plaintiff was under no obligation to make any other inventory, or keep any set of books of business transactions or any bills or invoices of any purchases or sales (if any were made) except such business, purchases, or sales, as were made since the date of the inventory; and if they believe that the plaintiff did keep such a record of sales or purchases and did produce it and the original inventory after the fire, then they are instructed that this is a sufficient compliance with the provisions of the policy in this respect."

(6) "The court instructs the jury that even though the inventory produced in evidence as taken within twelve months prior to the date of the policy, contained also items which were not insured, that this does not affect the validity and sufficiency of such an inventory."

(7) "The court instructs the jury that no evidence is admissible to change or alter the undertakings and promises of the parties to the contract of insurance, and that the waivers relied on instead of performances can only have reference to some fact, existing at the time of the alleged waiver. No provision of the 'iron safe' clause can be considered waived in this case other than if the jury believe, that the insured was told by the agents, that the inventory exhibited to them at the time of the issuance of the policy was sufficient, no other inventory would be required of him, although said inventory did not comply with the requirements of said clause. To this extent and to this extent only is any evidence admissible to show a waiver of

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any provision in said clause. Proofs of loss required by this policy may be waived by words, acts or conduct that reasonably induced insured to believe a strict compliance with the policy was not required."

(8) "The court instructs the jury that even though the plaintiff may have promised to produce any bills, invoices, other than those referred to in instruction No. 5, and failed so to produce them such a promise is not binding upon the plaintiff at all, especially if they believe he was unable to procure them and so notified the defendant company."

During the negotiations for the insurance, defendant in error showed the agents of plaintiff in error, who called at his place of business and solicited the insurance, the inventory he had made one month before, which, as defendant in error contends, was examined by these agents and not objected to, and with the property in sight and with full knowledge of what it was, they agreed to and did issue the policy thereon for \$700.00. The only articles sold by defendant in error after the inventory of July 21, 1902, were one coffin \$7.50, and one casket \$22.50, and no additional purchases were made. The book, in which the two sales were listed, was kept in the iron safe, and was the same book which contained the inventory of the stock, etc., insured; and this book, which had been produced to the agents of plaintiff in error after the fire, was before the jury. As to whether the inventory was or was not regarded as sufficient when the policy was issued, there was evidence contradictory of that offered by defendant in error, but that was a question of fact for the determination of the jury.

It is insisted that an affirmative warranty on the part of the insured may be satisfied by a very much less literal performance than a promissory warranty, and, therefore, the first instruction was calculated to mislead the jury to apply a loose or liberal construction to all the obligations of the policy including those which should be strictly performed; in other words,

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that while a substantial compliance with an affirmative warranty may be deemed sufficient, a strict performance of a promissory warranty, *i. e.*, a literal compliance with the iron safe clause, cannot be dispensed with.

It seems to be conceded as settled law that a substantial compliance with the requirements of the policy, other than the iron safe clause, is all that can be reasonable exacted. This is unquestionably the settled law as to the proof of loss. *Georgia H. Ins. Co. v. Goode*, 95 Va. 751, and authorities cited.

A substantial compliance with the provisions of the policy as to proof of loss being all that is required of the insured, and whether or not there has been such compliance being a question for the jury, especially where the policy does not provide forfeiture as a penalty for failure to strictly comply, the court in this case did not err in instructing the jury, that if "the plaintiff offered to the defendant a proper proof of loss, within a reasonable time, under all the circumstances of the case, after the fire and not later than sixty days prior to the end of twelve months from the date of the fire, then they are instructed that such offer was in full time, even though it was made more than sixty days after the date of the fire." The provision of the policy is, not that a failure to furnish proof of loss for "sixty days after the fire" shall operate as a forfeiture, but that "no suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

Where "no forfeiture is provided for in case of failure to furnish proofs, forfeitures being stipulated in case of breach of other requirements, or furnishing the proofs in the specified time is not expressly made a condition precedent to recovery, the great majority of recent decisions hold that the effect of failure to furnish them is merely to postpone the time of payment to the specified time after they are furnished." 13 A. & E. Ency. L., 329, and authorities cited.

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The real defense relied on by plaintiff in error is that the terms of the iron safe clause, requiring books to be kept clearly and plainly showing a complete record of the business transacted by defendant in error, had not been complied with.

In *Prudential Fire Ins. Co. v. Alley*, ante, p. 356, 51 S. E. 812, recently decided by this court, where the iron safe clause in the policy was identically the same as in the policy sued on here, it was held that a substantial compliance with that clause was all that could be reasonably required. In that case, the insured, to sustain his contention that he had complied with the iron safe clause, introduced in evidence, over the insurance company's objection, an inventory he had taken a short while before the removal of his business from Gate City, Scott county, to Appalachia, in Wise county, at which last named place the policy of insurance on his stock of goods was issued; two books, one to show the purchases and the other the sales made by the insured while doing business at Appalachia; and certain witnesses to explain the manner of keeping the books. The book of purchases was objected to because it did not give the items or articles claimed to have been purchased, nor show that they were such articles as were covered by the policy. The objection to the book of sales was that it furnished no data from which the insurance company could tell what had been sold, at what profit, or for what price, but merely purported to give the cash taken in each day; and it was further objected that the books introduced did not "clearly and plainly present a complete record of the business transacted, including all purchases, sales and shipments for cash and credit from the date of the inventory," as provided by the policy.

In that case, as in this, the evidence was conflicting as to whether or not the agent issuing the policy gave the insured to understand and believe that the inventory produced by him was a sufficient compliance with the provisions of the policy; and upon the question whether or not the books introduced were a substantial compliance with the requirements of the policy

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the opinion reviews the most recent authorities on the subject, including the decisions by the Supreme Court of the United States, and holds that the provisions of the iron safe clause, under all the facts and circumstances of the case, were substantially complied with by the insured. The facts and circumstances referred to in the opinion in that case were in many respects more favorable to the contention of insurer, with reference to the inventory produced and the books kept by the insured, than they are in the case under consideration.

It is true that in this case the only book kept was a "yellow book on inferior manilla paper," but the policy did not inhibit the list of sales made by the insured being kept in such a book, and there were no purchases made by him between the issuance of the policy and the fire, to be entered and kept. As we have observed, the only sales made by the insured were entered on this book, and it was in this book that the inventory made before the policy was issued appeared, and which was exhibited to the agents who issued the policy. This book was kept in the iron safe, and was produced to plaintiff in error's agents after the fire, who examined it as to the inventory, and only claims that his attention was not called to the entry of the two sales. The entry of the two sales was as plainly written in the book as was the inventory, and the agent who examined it after the fire, if he did not see the entry, made no inquiry as to sales, and it is not shown that the insured made any other sales.

The fourth assignment of error relates to the action of the court in modifying instructions Nos. 2 and 3, and in refusing instructions Nos. 5 and 6, offered by plaintiff in error.

Instruction No. 2 is as follows: "The jury are instructed that under the terms of the policy of insurance on which this action is founded, it was the duty of the assured to take a complete itemized inventory of the stock on hand at least once in each calendar year, and unless such inventory had been taken within twelve calendar months prior to the date of the policy

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sued on in this action, it was the duty of the assured to take such inventory within thirty days after the issuance of said policy; and if the jury believe from the evidence that the list of the property contained in the yellow blank book submitted in evidence was shown to the agents of the defendant company at, or a short time before, the writing of the said policy, and it was then understood between the parties not to be a sufficient compliance with the provisions of said policy in respect to the inventory therein required, and that a promise was then made by the assured to make a new inventory covering the stock embraced in the policy, and that after such promise and understanding said policy was written, the plaintiff cannot recover in this action unless they shall find that such new inventory was afterwards made by the plaintiff in accordance with the provisions of said policy."

The change made by the court in the instruction was, to add to its purport and meaning the qualification, "unless the insured was told by the agents of the insurer at the time the insurance was taken that the inventory exhibited to them was sufficient." The effect of this modification was to tell the jury that if plaintiff in error (the insurer) regarded the inventory taken July 21, 1902, as a sufficiently "complete itemized inventory of the stock," and on the strength of it issued the policy, then the jury was to also so regard it. As the evidence on that point was conflicting, it was entirely proper to modify the instruction as was done, otherwise it would have been incomplete and calculated to confuse and mislead the jury.

While the refusal to give plaintiff in error's instruction No. 6, is complained of in the assignment of error under consideration, the objection is not urged in the argument. This instruction told the jury that if they found from the evidence that defendant in error failed to make proof of loss within sixty days after the fire, such failure barred his right of recovery in this action, and they should find for plaintiff in error; in other words, that unless there had been a literal compliance with the

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requirement of the policy that proof of loss should be furnished by the insured within sixty days after the fire, he could not recover on the policy. For the reasons already stated the instruction was rightly refused.

As stated in the petition for this writ of error, the modification of plaintiff in error's instruction No. 3, and the refusal of its instruction No. 5, approach so closely to the crucial question in the case that they may be discussed in connection with the refusal of the court to set aside the verdict and grant a new trial.

The only compliance with the iron safe clause in the policy, with reference to keeping "a set of books," &c., was the memorandum in the small "yellow blank book on inferior manilla paper," in these words:

"Sept. 30, 1902.

"Sept. 30, by one coffin, Waters, \$7.50.

"Nov. 14, by one casket, Rennels, \$22.00."

This book, as has been remarked, was kept in the iron safe and produced after the fire, and while defendant in error had another book, spoken of as a ledger, in which he made entries of certain business transactions with customers, and which was kept in his desk and lost in the fire, it is not pretended, so far as this record discloses, that he made a single purchase as an addition to his stock of coffins, etc., covered by the policy, or made any sales not entered in the "yellow blank book." Yet plaintiff in error sought to have the jury instructed that as a matter of law defendant in error had not complied with the iron safe clause, and, therefore, could not recover in this action.

Nor is it shown, or attempted to be shown, by any evidence in the cause, that the loss of the ledger, which was burned, operated injuriously to the plaintiff in error. It contained no entry of transactions essential to an understanding of what had been the business transactions by defendant in error as an undertaker.

Three questions were submitted to the jury; the first was as

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to whether or not the inventory taken by defendant in error July 21, 1902, was regarded by the agents of plaintiff in error as sufficient, and they gave the defendant in error to so understand; second, whether there had been a substantial compliance with the requirement of the policy as to proof of loss; and, third, whether or not the memorandum of sales made by defendant in error in the "yellow blank book," between the date of the policy and the fire, was a substantial compliance with the iron safe clause.

With reference to the first question, while the agents of plaintiff in error who solicited the insurance and issued the policy testified that the inventory when submitted to them was not recognized and admitted to be a sufficient compliance with the terms of the policy with respect to the inventory therein required, the defendant in error testified to the contrary, and the jury chose to believe him, which is conclusive of that question, the case being heard here as upon a demurrer to evidence.

As to the second question, while the notice to plaintiff in error as to the loss, which was total, was informal, its agents appeared on the ground to ascertain the facts as to the fire, etc., and negotiations followed with reference to the payment of the loss, the plaintiff in error taking no steps towards the payment thereof, and when Kern, the attorney for defendant in error, presented to the general agent of plaintiff in error, a formal proof of the loss in October, 1903, the latter did not point out any defects in the proof offered, but clearly indicated a purpose to contest the right of defendant in error to recover on his policy by reason of his failure to comply with the iron safe clause as to the books he was required to keep. Under these circumstances, the jury was warranted in finding, either that there had been a waiver as to proof of loss, or that there had been a substantial compliance with the requirement of the policy in that respect.

The question whether or not there had been a substantial compliance with the iron safe clause with reference to the books

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required by the policy to be kept was submitted fairly to the jury on the instructions given, which told the jury what was the legal effect of the failure to keep such books, and then left it to the jury to say whether or not such books were kept in point of fact. What was required was "a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, from date of inventory . . . and during the continuance of the policy." It was not required that the record of sales should show at what price sold, whether for cash or on time, nor was it required that the book or books show whether the sales were for cash, or on credit, but only that there should be a complete record of the business transacted, etc., and whether a sale was for cash or on credit, it was to be entered as a sale. Nor did the policy inhibit the list of sales being kept in a "yellow book of inferior manilla paper." There had been no purchases, and only two coffins sold, and these sales were listed in the same book with the inventory made before the policy was issued, exhibited to the agents who agreed to issue the policy. That this book was kept in the iron safe and exhibited after the fire is not denied. Let us suppose that there had been neither a sale nor a purchase by the insured between the issuance of the policy and the fire; could the insurer have avoided the payment of the loss on the ground that the iron safe clause had been violated? Certainly not.

The opinion in *Prudential F. Ins. Co. v. Alley*, *supra*, quotes from the opinion of the Supreme Court of the United States in *L. & L., &c. Ins. Co. v. Kearney*, 180 U. S. 132, the words of the policies in suit, what is the better and more reasonable interpretation of those provisions so far as they relate to the issues in this case? The covenant and agreement to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business, should not be interpreted to mean such books as would be kept by an

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expert bookkeeper or accountant in a large business house in a great city.* That provision is satisfied if the books kept were such as would fairly show to a man of ordinary intelligence 'all purchases and sales both for cash and credit.' "

In *Prudential F. Ins. Co. v. Alley, supra*, referring to the books kept by the insured, the opinion says: "While the book of purchasers does not give an itemized statement of all goods purchased after the inventory was taken, it does show the amount of each bill of goods purchased, when and from whom. Neither does the book of sales give an itemized statement of the goods sold, but it does give with a few exceptions, which are satisfactorily explained, the amount of each day's sales. It clearly appears that no goods were sold or authorized to be sold by the insured upon credit, and that such goods as were sold without being paid for by the purchaser were treated as cash sales on the book of sales and accounted for as cash by the clerk who sold them." Then it was held that the provisions of the iron safe clause, under all the circumstances of the case, were substantially complied with. In other words, while the books under consideration were not kept as books would be kept by "an expert bookkeeper or accountant in a large business house in a great city," such bookkeeping was not to be expected of a storekeeper in a little mining town, and if the insurer expected it, it ought to have said so in plain language; that where a record of the sales and purchases in a business is so kept as of itself to show the business transacted, or where with explanation as to the entries it shows the business transacted, such a record is a substantial compliance with the iron safe clause of an insurance policy.

The reasoning upon which the conclusion is reached is obvious. The object of the iron safe clause is to protect the insurer against fraud by requiring that in case of the destruction of the property the insured will furnish a set of books which will present clearly and plainly a complete record of the business he has transacted while the policy was in force, and if the

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compliance with the requirement be sufficient to protect the insurer against fraud, it is all that can be reasonably required; otherwise a just liability on the insurer might in many cases be avoided by the defense that the requirement had not been literally complied with, although it was not stipulated what system of bookkeeping was to be employed by the insured, and no harm whatever had come to the insurer by reason of the iron safe clause not having been literally complied with.

The courts in construing policies of insurance do not look for grounds of forfeiture, but rather incline to shut their eyes to them. *L. F. Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177.

As said by this court in *Ga. H. Ins. Co. v. Bartlett*, 91 Va. 305, 21 S. E. 476, 50 Am. St. Rep. 832: "These insurance policies abound with innumerable stipulations, forfeitures, and provisions hard to understand, and difficult of performance, and it is a well settled rule that they must be strictly construed against the insurer, and liberally in favor of the insured."

We do not appreciate the force of the contention that "the doors of fraud are thrown wide open" and the "moral hazard" greatly increased, because the insured in this case, a village undertaker, kept the list of his two sales from his stock of goods insured in a "yellow blank book," which he kept in his safe and produced after the fire, instead of keeping another and different "set of books" in which the two sales were listed, when the latter course would have presented no more "clearly and plainly a complete record of the business transacted" than the book he kept and produced.

Upon the whole case, we are of opinion that the judgment of the Circuit Court should be affirmed.

Affirmed.

Syllabus.

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NORFOLK & WESTERN RAILWAY V. HARMAN.

November 23, 1905.

1. INSTRUCTIONS DIRECTING A VERDICT—*Partial Case—Carriers—Case at Bar.*—In an action to recover damages for injuries inflicted on live stock and household goods, shipped under one bill of lading containing provisions applicable only to the live stock, it is not error to refuse to instruct the jury to find for the defendant unless they believe that the provision as to live stock has been complied with. The plaintiff may be entitled to recover for his goods although the provision as to live stock has not been complied with.
2. EVIDENCE—*Admissibility—Construction of Instruments—Functions of Court and Jury.*—It is the province of the court, and not of the jury, to determine upon the admissibility of evidence and to construe written instruments, and it is error to refer to a jury the determination of what, if any, parol evidence which has been received without objection, is in conflict with a bill of lading introduced as the basis of the action, and to disregard it.
3. BILL OF LADING—*Unintelligible Characters—Meeting of Minds.*—Unintelligible characters placed on a bill of lading which convey no meaning to a person of ordinary intelligence and which are not explained to the shipper, do not bind him, nor can the court take judicial notice of their meaning, or say, as a matter of law, that the minds of the parties met as to their meaning.
4. BILL OF LADING—*Limiting Liability—Reasonableness—Fair Contract—Unintelligible Characters.*—The test heretofore applied to determine the validity of a contract between a shipper and carrier limiting the amount for which the carrier may be held liable, in consideration of a reduced rate of carriage, has been, was the contract fairly entered into, and its terms just and reasonable. Even if the correctness of the test be conceded, it cannot be said to have

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been fairly entered into if it contains unintelligible and unexplained terms to which the attention of the shipper was not called, and which are sought to be enforced against him.

Error to a judgment of the Circuit Court of Botetourt county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Jos. I. Doran, E. M. Pendleton and Marshall McCormick, for the plaintiff in error.

Benjamin Haden, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

O. C. Harman, the plaintiff in this cause, was a farmer, and had resided with his family at Ewing, in Lee county, Virginia, until the early part of November, 1904, when, determining to return to Botetourt county where he had lived formerly, he loaded in a box car his household goods, family supplies, wagons, utensils and animals (two mules, one horse, and a cow and calf), and accepted and signed a bill of lading from the Louisville and Nashville Railroad Company for the transportation of said articles by that company from Ewing, Va., to the terminus of that company's line at Norton, Virginia, there to be delivered to the Norfolk & Western Railroad Company for transportation to Cloverdale, Va., this being a station of the N. & W. Ry. Co. in Botetourt county nearest to the new home to which Harman was moving.

The car was duly transported without special incident by the L. & N. R. Co., and delivered at Norton to the N. & W. Ry. Co., and from thence by the latter company was duly transported to Roanoke, Virginia, arriving at the latter point on the night of November 12, 1904; Harman and his young son travel-

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ling in the same train, and generally in the same car. While upon the yards of the N. & W. Ry. Co, at Roanoke, and being shifted on to the line of that company over which the car was to be transported to Cloverdale, the car was so roughly handled as to cause serious damage to the two mules, the family supplies, household goods, etc.; and to recover for this injury Harman brought this suit against the N. & W. Ry. Co.

There was a verdict and judgment in favor of the plaintiff for \$500.00, with interest thereon from June 8, 1905, till paid, to which a writ of error was awarded by one of the judges of this court.

The first error assigned is that the trial court erred in refusing to give to the jury the following instruction, asked by the plaintiff in error, viz:

"The court instructs the jury that a bill of lading is a contract between the shipper on the one part and the carrier on the other, and they must be controlled in their verdict by it, and if the jury believe from the evidence that the plaintiff did not give notice to defendant's agent at Cloverdale, as required by the 12th clause of the bill of lading, then the jury must find for the defendant."

The 12th clause of the bill of lading is as follows:

"As a condition precedent to the shipper's right to recover damages for loss or injury to said animals, he will give notice in writing of his claim thereof to the agent of the railroad company or other carrier from whom he receives said animals before said animals are removed from the place of destination above mentioned, or from the place of delivery of the same to said shipper, and before said animals are mingled with other animals."

This bill of lading is of the class used by the initial carrier. "*For the transportation of live stock over its lines,*" while opposite the name of "consignee, destination, &c.," and under the heading, "description of stock," besides "3 head horses," "2 do. cattle," there also appear "H. H. Goods," "Rel. Val.

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Lts., 5 cwt.” Clearly, as is readily to be observed, clause 12 of the bill of lading could not have had and was never intended to have application to suits to recover damages for loss or injury to property other than “animals.” In fact, it was nowhere claimed in the conduct of the case before the jury that this clause of the bill of lading had any such application. Defendant in error sued to recover for injuries, not only to his two mules, but to family supplies, household goods, furniture, etc., contained in the same car and set out in the bill of particulars filed with his declaration, amounting to \$726.55, of which amount \$300 was claimed for injuries to the mules; yet the trial court was asked to instruct the jury that he could not recover for the damages done to his household goods and other property unless he gave written notice to the agent at Cloverdale about the injury to his mules. If the full force and effect, as claimed by plaintiff in error, be given the bill of lading, it would not have justified the giving of this instruction, inasmuch as it could have no application to anything contained therein other than the “animals.” For this all-sufficient reason, the instruction was rightly refused.

After the court had passed upon the instructions asked for by both parties, and after the argument had been partly made, it was asked by plaintiff in error to give the following instructions:

“B. The jury is instructed that the bill of lading introduced in evidence in this case, in all of its parts, constitutes the contract between the parties and no parol evidence is admissible to vary its terms. If such parol evidence has been before the jury, which is in conflict with this contract the jury must disregard it.”

“C. If the jury believe from the evidence that the plaintiff is entitled to recover in this action, then in assessing such damages against the defendant, the jury must estimate the damages on the supposition that the plaintiff’s goods, live stock, &c., were only worth \$5.00 for every hundred pounds of weight they

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weighed, and the burden of proof of their weight is on the plaintiff. In no event can the jury find on account of damage to the mules more than \$5.00 per hundred of their weight, the court telling the jury in this case that the measure of the railway company's liability is to be determined by the weight of the articles loaded in the car."

Instruction "B" directed the jury to disregard any parol evidence which the jury might decide to be in conflict with the bill of lading. It did not tell the jury that any evidence had been admitted which was in conflict with the bill of lading, and which they should disregard, but left them to review the rulings of the court in admitting testimony, and to decide for themselves whether any evidence introduced did conflict with the bill of lading, what that evidence was, and to disregard it, when in point of fact the record discloses that no evidence was admitted by the court to which plaintiff in error excepted as inadmissible. It has been said again and again by this court that it is the duty of the court, and not the jury, to pass upon the effect of written instruments. *City of Richmond v. Gallego Mills*, 102 Va. 165, 45 S. E. 877, and authorities cited. It is also too well settled to admit of citation of authority, that the admissibility of testimony is for the court and not for the jury.

It was sought by instruction "C" to announce to the jury as the court's interpretation of the bill of lading, in the light of the evidence, that the measure of the plaintiff's damage was \$5.00 for every hundred pounds that his property—his goods and live stock—weighed, when there is nothing whatever in the evidence of any agreement between the parties that the value of the plaintiff's property was only \$5.00 for every one hundred pounds of weight, or was to be limited to that valuation in case of injury thereto by reason of the negligence of the carrier, unless it be that the characters, "Rel. Val. Lts. (or Ltd.) 5 Cwt.,"

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appearing on the bill of lading as before stated, meant that the plaintiff and the defendant had agreed that the property should be considered as worth only five dollars for every hundred pounds of weight.

There is certainly no evidence in the record as to what the characters stood for, or that they had any meaning at all. We have taken occasion to examine the original bill of lading, and find that the characters in question are not only badly written, but have no such connection with the intelligible portions of the paper as would throw any light upon them as showing their meaning; and, therefore, it cannot be said that their meaning was discernible to a person of ordinary intelligence. There is no dollar mark in front of the figure 5, and its use would be meaningless, certainly to a person even of a high order of intelligence, in the hurry usual in the issuing and receiving of a bill of lading for goods shipped. But even if the characters of which we are speaking would bear the interpretation claimed for them, they would be glaringly inconsistent with the 10th clause of the bill of lading, in which a different and higher valuation is placed upon the mules.

Upon the record before us we do not consider that we are called upon to review the authorities cited by counsel for plaintiff in error for the proposition that a statute such as we have—sec. 1294c Va. Code, 1904—providing that no agreement made by a transportation company for *exemption* from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid, does not prohibit the making of a contract between a common carrier and a shipper *limiting* the liability of the former for injury or loss occasioned by its own neglect or misconduct as a common carrier. In the cases decided by this court, holding that a common carrier can make a valid and binding contract, not *exempting* the carrier from liability for the negligence of itself or its servants, but *limiting*

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the amount in which the carrier shall be liable, in consideration of carriage at a reduced rate, it is declared that the test to be applied in all such cases is, was the contract fairly entered into, and are its terms just and reasonable.

If it were conceded that the terms of the contract here contended for by plaintiff in error are just and reasonable, it cannot, in the face of the facts to which we have adverted, be maintained that such a contract was fairly entered into by the defendant in error, and therefore instruction "C," asked by plaintiff in error, was properly rejected.

The third assignment of error relates to the modification of plaintiff in error's instruction "A," which as given—the modification being italicized—is as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiff is entitled to recover in this action, in assessing damages against the defendant, they must estimate the damages upon the supposition that the plaintiff's goods, live stock, &c., were only worth \$5.00 for every hundred pounds they weighed; that is to say, if the plaintiff's mule weighed 1,000 pounds then in estimating damages they must treat it as worth not more than \$50.00 when received by defendant, and the jury can not find any more damages on account of injuries to the mule than the difference between \$50 and the value of the mule when it was delivered by defendant to the plaintiff, and under this bill of lading plaintiff can recover no more than \$50 for each mule injured; *provided the jury believes the bill of lading was a special contract, fairly made in consideration of a special rate of transportation, and that the minds of the parties fairly met on the agreement.*"

To what we have said in considering the second assignment of error, all of which is applicable to the assignment here under consideration, it need only be added that the Circuit Court, in the absence of evidence, could not, as a matter of law, say what these characters, "Rel. Val. Lts. (or Ltd.) 5 Cwt.," meant, or that the minds of the parties had met as to their meaning;

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therefore, the modification of the instruction is no ground of complaint on the part of plaintiff in error, since the most it could reasonably ask was to have submitted to the jury the question whether the parties understood and agreed that the characters had the meaning contended for by plaintiff in error in the instruction "A" with the modification made to it by the court.

The remaining assignment of error is to the refusal of the court to set aside the verdict and grant plaintiff in error a new trial.

The evidence proves clearly the negligence—gross negligence—of plaintiff in error, resulting in injury to defendant in error's property, and the latter proves his whole bill of particulars filed in the cause, amounting to \$726.55, while the jury found for him a verdict of \$500.00 only, thereby leaving to plaintiff in error no ground whatever for complaint as to the amount of damages assessed against it.

The judgment of the Circuit Court is right, and will, therefore, be affirmed.

Affirmed.

Syllabus.

Richmond.**DUNCAN CAMPBELL AND OTHERS V. BRYANT, MAYOR,
AND OTHERS.**

November 23, 1905.

1. **EQUITY—Jurisdiction—Unauthorized Tax.**—Equity has jurisdiction to enjoin the collection of an unauthorized tax and to declare unconstitutional the law under which the tax is imposed.
2. **EQUITY—Injunction—Unauthorized Tax—Parties.**—Where the Mayor and council of a town imposing an unauthorized tax are parties in their official capacity to a bill to enjoin the collection of the tax, it is not necessary to make the town a party by name.
3. **CONSTITUTIONAL LAW—Incorporating Cities and Towns—Special Legislation.**—Since the adoption of the present Constitution, the Legislature can, as formerly, grant charters creating cities and towns, but when such charters are granted the city or town so chartered must be organized and governed in accordance with the general laws. It cannot pass special laws conferring rights and privileges different from those prescribed by the general law, as this would be obnoxious to the constitutional provision forbidding special legislation.
4. **MADISON HEIGHTS—Charter Unconstitutional.**—The charter of the town of Madison Heights is obnoxious to the constitutional inhibition against special legislations in numerous particulars. The time for holding elections of mayor and councilmen, the territorial extent of the jurisdiction of its mayor, and the powers of its sergeant, are all different from the provisions of the general law. Other provisions are without any general law to support them and are hence invalid, as Sec. 117 of the Constitution is self-executing so far as it prohibits special legislation, and also to the extent that it amends the charters of cities and towns so as to make them conform to the provisions of the Constitution.

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5. **CONSTITUTIONAL LAW—Uniform Taxation—Towns—Exemption from County Levies.**—The Legislature has no power to exempt the taxable persons and property in a town situated within the limits of a county and forming a part thereof, from county levies, as sec. 168 of the Constitution expressly provides that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and this uniformity extends not only to the rate and mode of assessment, but also to the territory to be assessed.
6. **CONSTITUTIONAL LAW—Law Void in Part—Dependent Provisions.**—Where a town charter is required to be accepted by a vote of the citizens before it becomes operative, and the chief inducement to vote for the charter is a provision therein exempting the persons and property within the town from certain taxes, which exemption is declared unconstitutional and void, the whole charter will be held to be invalid.
7. **UNCONSTITUTIONAL LAW—Effect of Passage.**—An unconstitutional law confers no rights; imposes no duties, affords no protection, and is, in legal contemplation, as inoperative as though it had never been passed.
8. **MUNICIPAL CORPORATIONS—Dissolution—Invalid Incorporation.**—While a court of equity cannot dissolve a municipal corporation which once had a legal existence, it may declare unconstitutional an Act of Assembly which seeks to bring it into existence, in a proper proceeding which involves the validity of said Act.

Appeal from a decree in chancery of the Circuit Court of Amherst county. Decree for defendants. Complainants appeal.

Reversed.

The opinion states the case.

Wm. Kinckle Allen and Caskie & Coleman, for the appellants.

Jno. G. Haythe and Whitehead & Whitehead, for the appellees.

HARRISON, J., delivered the opinion of the court.

By an act of the General Assembly, approved March 14,

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1904 (Acts, 1904, p. 283), entitled, "an act to incorporate the town of Madison Heights, in Amherst county," it was enacted that the territory in Amherst county contained within the limits set forth and described in section two of the act should be deemed and taken as the town of Madison Heights, and that the inhabitants thereof should be a body politic under that name for all purposes for which towns are incorporated in this Commonwealth. By the terms of the act, the charter thereby created was not to become operative until it had been ratified by a majority of the registered voters within the limits of the proposed town, and by a majority vote of the freeholders voting at the special election to be ordered by the judge of the Circuit Court of Amherst county, for the purpose of ascertaining the will of those entitled to vote on the question.

In pursuance of the terms of the act, an election was held on the 10th day of May, 1904, at which a majority of the whole vote cast was for the ratification of the charter, and a majority of the freeholders voting were likewise in favor of such ratification. It further appears that on the 7th day of June, 1904, A. J. Bryant was elected mayor; and George A. Christian, C. P. Shaner, J. H. Cooper, George T. Harris, Thomas H. Banton and C. E. Bell, councilmen. At a meeting of these persons, claiming to be mayor and councilmen, respectively, of the town of Madison Heights, by virtue of the election of June 7, 1904, certain persons were appointed officers of the town, among others J. D. Mays, as sergeant and collector; and on the same day the council proceeded to levy a tax for various town purposes, for the year ending June 30, 1905, amounting in the aggregate to \$2,010.00, and to place the same in the hands of J. D. Mays, sergeant, for collection.

Shortly thereafter (the date does not appear), the bill in this case was filed by Duncan Campbell and twenty others, suing for themselves and on behalf of all other citizens of the territory embraced within the limits designated by the charter act, alleging that said act, purporting to incorporate the town of

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Madison Heights, was unconstitutional and void, and that the mayor and council of the so-called town were therefore without authority to levy or collect taxes, and praying that the taxes assessed by the council be declared to be nugatory, and that J. D. Mays, the pretended sergeant of such town, be perpetually enjoined from undertaking to collect the same. To this bill the persons already mentioned, styling themselves mayor and council of the town of Madison Heights, and J. D. Mays, styling himself collector of said town, were made parties defendant; and filed a joint demurrer and answer in their own right and in their several official capacities, in which answer they deny all of the material allegations of the bill, insisting upon the validity of the charter act of March 14, 1904, and of their proceedings thereunder.

Upon the hearing, the Circuit Court of Amherst county, by decree of March 16, 1905, overruled the demurrer, but dismissed the bill upon the ground that the complainants were not entitled to the relief prayed for. This conclusion of the Circuit Court, which rests upon the view that the act of March 14, 1904, incorporating the town of Madison Heights, is constitutional, is called in question by the present appeal.

The demurrer was properly overruled. The jurisdiction of a court of equity in this class of cases is well established. *Bull v. Read*, 13 Gratt. 78; *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367; *Johnson v. Drummond*, 20 Gratt. 419; *Redd v. Supervisors*, 31 Gratt. 695; *Lynchburg, &c. v. Dameron*, 95 Va. 545, 28 S. E. 951; *Cahoon v. Iron Gate*, 92 Va. 367, 23 S. E. 767; *Day v. Roberts*, 101 Va. 248, 43 S. E. 362.

The mayor and members of the council are parties defendant and have appeared and answered the bill in their official capacity, as well as in their own right. It was, therefore, not necessary to make the town a party by name. It was present through its mayor and council, who were the only parties who could have

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represented it. To have, in addition, made it a party by name would have been a vain act, serving no purpose, which is not required. This view is sustained by authorities already cited in support of the jurisdiction of the court.

Section 117 of the Constitution provides, that general laws for the organization and government of cities and towns shall be enacted by the General Assembly, and that no special act shall be passed in relation thereto, except in the manner prescribed in article 4 of the Constitution. What special acts may be passed in relation to cities and towns, under art. 4 of the Constitution, need not now be considered, for it is clear that cities and towns not in existence when the Constitution went into effect can only be organized and governed in accordance with the general laws. This provision of our present fundamental law prohibiting special legislation and providing that general laws for the organization of cities and towns shall be enacted, and that no special act shall be passed in relation thereto, is second to no other provision of the Constitution in value and importance, and cannot be too carefully observed or strictly enforced.

Of course the Legislature can, as formerly, grant charters creating cities and towns, but when such charters are granted the city or town so chartered must be organized and governed in accordance with the general laws, otherwise the charter would be obnoxious to the constitutional provision forbidding special legislation.

The charter of the town of Madison Heights, as set forth in the act of March 14, 1904, is obnoxious in numerous particulars to the constitutional inhibition against special legislation. It is not necessary to point out in this opinion all of the material respects in which the powers sought to be conferred by the act in question differ from the powers conferred upon towns by the existing general law. One or two examples may be mentioned.

Clause 20 of the act provides, that the election of mayor

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and councilmen of Madison Heights shall be on the first Tuesday, in June, 1904, and every two years thereafter; whereas, under the general law, town elections for mayor and councilmen must be held on the second Tuesday in June. Va. Code, 1904, sec. 1021.

It is provided that the mayor of Madison Heights shall be invested with the power and authority of a justice of the peace, within the limits of the town and to a distance of one and one-fourth miles beyond in Amherst county; and shall exercise like jurisdiction in all cases originating within such limits that a justice of the peace may now or hereafter have and exercise. This provision gives to the mayor both civil and criminal jurisdiction within the corporate limits and for a distance of one and a quarter miles beyond; whereas, the general law (Va. Code, 1904, sec. 1032) provides, that the jurisdiction of the corporate authorities of each town or city, in criminal matters and for imposing and collecting a license tax on all shows, performances, and exhibitions, shall extend one mile beyond the corporate limits of such town or city; and further provides (Va. Code, 1904, sec. 1033a), that the civil jurisdiction of mayors of towns shall be confined to the corporate limits of the town, and their criminal jurisdiction to such limits and one mile beyond.

The sergeant of the town is given all of the powers and authority of a constable and conservator of the peace within the corporate limits, and for a distance of one and a quarter miles beyond; whereas, as already pointed out, the jurisdiction of the corporate authorities of a town is limited by the general law to one mile beyond the corporate limits.

Without further detail it may be said, that most of the important provisions of the act incorporating the town of Madison Heights are either in conflict with the existing general law, or without any general law to support them. The fact, however, that no general law on the subject has been passed does not affect the question. Section 117 is self-executing so far as it

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prohibits special legislation, and also to the extent that it amends the charters of towns and cities, so as to make them conform to the provisions of the Constitution. *Hicks v. City of Bristol*, 102 Va. 861, 47 S. E. 1001.

It would seem from clause nineteen of the act that the draughtsman of the charter intended to confer special authority and power, it being there provided, that "in addition to the special powers hereinbefore especially delegated to the town council, all general powers not in conflict with the laws of this State or of the United States, necessary for the proper government of said town, and which are by law allowed to municipal corporations, are hereby likewise delegated and vested in the said town council."

If, however, the Legislature had possessed the power to pass an act for the organization and government of a town conferring special powers, the charter in the case at bar would still be invalid, because it exempts the persons residing within the territorial limits of the proposed town from the payment of certain taxes to the county of Amherst, in violation of section 168 of the Constitution, which expressly provides that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. This court has held that a town is a part of the county for all purposes of taxation, and that the Legislature has no power, by reason of the constitutional inhibition mentioned, to exempt the taxable persons and property in a town situated within the limits of a county and forming a part thereof, from county levies; that a part of a county cannot be made to bear all the burden of taxation for county purposes; and that the uniformity required extends not only to the rate and mode of assessment, but also to the territory to be assessed, and when a tax is levied by a county it must be uniform throughout the county. *Day v. Roberts*, 101 Va. 248, 43 S. E. 362.

In the case cited the court was construing a similar pro-

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vision in the Constitution of 1869. The provision in the present Constitution is possibly more explicit in providing that taxation shall be uniform within the territorial limits of the authority levying the tax than that construed in *Day v. Roberts, supra*. This being so, the county of Amherst can and must levy the same taxes upon the people and property of Madison Heights as upon the rest of the county. The provision of the charter exempting the people of that town from the taxes mentioned is therefore wholly nugatory.

This provision for exemption from taxes cannot be held invalid and the residue of the act be permitted to stand unaffected by the illegal section, as was done in the case of *Cahoon v. Iron Gate, &c., supra*, because to escape the payment of such taxes was one of the chief inducements held out by the charter to get the tax-payers of the proposed town to vote for the charter when it was submitted to them for their approval or rejection, and we cannot say that the people would have voted for the charter if that provision had been omitted. In such a case the whole charter must be held invalid. *Robertson v. Preston*, 97 Va. 296, 301, 33 S. E. 618.

It is not necessary to consider other features in which it is contended that the act of March 14, 1904, is invalid. It being unconstitutional in the particulars pointed out, the appellees had no power or authority to levy or collect the tax complained of. The act being unconstitutional, it is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. *Norton v. Shelby County*, 118 U. S. 425, 30 L. Ed. 178, 6 Sup. Ct. 1121.

The authorities relied on by the appellees (see *Agner's Case*, 103 Va. 811, 48 S. E. 493), in support of their argument that the courts have no power to dissolve a municipal charter; that municipalities exist only by legislative sanction, and cannot be dissolved or cease to exist except pursuant to legislative provision, have no application to a case like this. There is no undertaking

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to dissolve the charter of Madison Heights, and no such decree is asked for. It is a proceeding, sanctioned by a long line of Virginia decisions, asking for relief from an unconstitutional and therefore illegal tax. We are only holding that the act attempting to incorporate the town of Madison Heights and providing for its organization and government is invalid because not passed in conformity with the Constitution of the State. In other words, we determine that the act, which it is claimed creates the town and gives its council the power to levy the tax complained of, is a nullity because in violation of the Constitution. If it had ever been a valid act, then the court could not annul it or declare it forfeited; that would be a legislative power. But whether or not there is a valid act or charter authorizing the tax complained of is a judicial question, and the court not only has the right but is bound to pass upon such a question whenever it is properly presented.

For these reasons the decree appealed from must be reversed and this court will enter here such decree as the lower court ought to have entered, declaring the tax complained of invalid and perpetually enjoining the appellees from all further attempt to collect the same.

Reversed.

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PENCE v. LIFE.

November 23, 1905.

1. ELECTION BY WIDOW—Dower—Devise of Wife's Land—Code, sec. 2271.

The provisions of sec. 2271 of Code have no application to a case where a testator disposes of property belonging to his wife in her own right and also makes provision for her out of his estate by his will, but were intended to provide how a widow must proceed who desires to reject the provision made for her by her husband's will out of property other than her own, and to take such interest in his lands as the law gives her.

2. ELECTION—Devise of Wife's Land—Election of Widow—How Made.—

Where a testator disposes of property belonging to his wife in her own right, and also makes provision for her by his will, she has the same right of election as to such property as any other person has, and whether or not she has elected to take under or against the will is to be determined as in other cases. Such election need not be express, but may be implied by conduct, acts, omissions and mode of dealing with the property. In the case in judgment the widow clearly elected to claim her own land by selling and conveying it by deed with covenants of general warranty a few days after the death of her husband. It is immaterial whether the purchaser was a devisee or legatee under her husband's will, or was a stranger to it.

3. SPECIFIC PERFORMANCE—Terms of Contract—Security for Deferred Payments.—

A vendee of land who is required to specifically perform his contract of purchase should also be permitted to execute a deed of trust to secure the payment of the purchase money bonds not yet due where the contract of purchase provides for such security for deferred instalments of purchase money.

Statement.

Appeal from a decree in chancery of the Circuit Court of Augusta county. Decree for complainant. Defendant appeals.

Corrected and affirmed.

The following extract from the decree appealed from is necessary to a clear understanding of paragraph three of the syllabus:

"Third. That the said defendant, James M. Pence, do forthwith pay to the said plaintiff, Josephine F. Life, or to her counsel, of record in this cause, the said sum of sixty-four hundred dollars, and interest thereon from May 1, 1902, till paid, together with her said costs in this cause, and that he do also forthwith execute and deliver to her or her said counsel his three promissory notes for said three deferred instalments of purchase money; that is to say, each note to be for the principal sum of thirty-two hundred dollars, to bear legal interest from May 1, 1902 (the interest on each note to be made payable at the maturity of each note), and to be made payable to said Josephine F. Life.

"Fourth. That this court will retain in its possession, undelivered, the said deed from said Life to said Pence, which was filed in this cause by said plaintiff as Exhibit B. with her bill, until all of said purchase money, whether now due or hereafter to fall due (together with said costs), shall have been fully paid by said Pence or by some one for him, and will retain the title to said land as security for the payment of said unpaid purchase money (in lieu of requiring same to be secured by trust deed as called for by said written contract of sale and purchase—the failure of said Pence to carry out his said contract, having now rendered it impracticable to secure said unpaid purchase money by trust deed, as originally contemplated), and for the payment of said costs."

H. H. Blease and J. M. Perry, for the appellant.

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Braxton & McCoy and W. H. Landes, for the appellee.

BUCHANAN, J., delivered the opinion of the court.

This was a suit for the specific execution of an agreement for the sale and purchase of land.

Two grounds of defense were relied on by the grantee—one, that after entering into the contract sued on, its terms had been changed by a subsequent parol agreement, under which he had gone into possession; the other, that the title to the "Ross parcel," nearly one-fourth of the tract purchased, was defective.

1. The alleged subsequent parol agreement was not proved as stated in the grantee's answer, and if it had been the acts of part performance proved were not sufficient to take it out of the operation of the statute of frauds.

2. *As to the alleged defect in title to the "Ross land."*

One of the parties through whom the vendor claimed to derive title to that parcel of land, was Lettie Freeman. William Ross, who died in 1812, devised that land (115 acres) to his daughter, Lettie, who afterwards intermarried with Richard Freeman. He died February 6, 1870, leaving a will by which he gave to his wife, Lettie, certain personal property, and a life estate in a farm designated as his "home place," which included the "Ross parcel" owned by his wife. Subject to the life estate given his widow, he devised that portion of the "home place" which embraced the "Ross parcel" to his granddaughter, Signora C. Swisher, and the residue to his daughter, Margaret M. Life. On the 16th day of that month his widow conveyed the "Ross parcel" in fee simple, with covenants of general warranty, to Margaret M. Life and her husband, Samuel Life. On the 28th of the same month, Richard Freeman's will was admitted to probate. On the 17th of the following May his widow departed this life without having renounced her husband's will in the manner prescribed by section 2271 of the Code. On January 1, 1873, Margaret M. Life and her husband

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conveyed the land which was devised her by her father, and the "Ross parcel," to James K. McComb, and on the next day McComb conveyed both parcels to Samuel Life. The latter, by his will, probated August 24, 1894, devised all his lands including the "Ross parcel" to Josephine F. Life, his second wife, the vendor and appellee.

The contention of the appellant (the vendee) is, that the title of the appellee is defective, in this: that Lettie Freeman, the widow of Richard Freeman, having failed to renounce the provisions of her husband's will in the manner provided by section 2271 of the Code, is presumed to have elected to take under the will, and consequently only had a life estate in the "Ross parcel," and at her death it passed in fee to Signora C. Swisher, to whom Richard Freeman had devised it.

The provisions of that statute have no application, as we understand them, to a case like that we are now considering. They were intended to provide how a widow must proceed who desires to reject the provisions made for her by her husband's will out of property other than her own, and to take such interest in his lands as the law gives her. Where a testator disposes of property belonging to his wife, in her own right, and also makes provision for her by his will, she has the same right of election as to such property as any other person, and whether or not she has elected to take under or against the will is to be determined as in other cases. *Penn v. Guggenheimer*, 76 Va. 839, 849-50; *Kinnaird v. Williams*, 8 Leigh. 400, 31 Am. Dec. 658; *Taylor v. Browne*, 2 Leigh. 419.

In *Penn v. Guggenheimer*, *supra*, the testator had disposed of certain property owned by his wife and also made provision for her by his will. It was held that the wife was put to her election, and that she could not choose both her own estate and the bequests and devises made in her favor. It was further held that her election need not be express, but might be implied, as in other cases of election, from her conduct, acts, omissions and mode of dealing with the property.

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In *Taylor v. Browne*, *supra*, the question was whether the wife's election could be made in any other way than by a renunciation of the will in the manner prescribed by statute. This court held that the Act of Assembly had no relation to a case of election to take by title paramount to the will or under the provisions of the will.

In *Kinnaird v. Williams*, *supra*, the testator, after giving several small legacies, devised all his real estate and slaves to his wife for life, and an interest in the proceeds of his other personal property after the payment of his debts. He devised the remainder interest in the lands to and for the benefit of other persons. Within a year after the testator's death, his widow instituted a suit against the other persons interested in the real estate under the dispositions thereof made in the will, claiming the whole of the lands as her own, by title paramount to the will, and recovered the same. After her death her sole devisee, who was her personal representative, instituted suit against the executor of her husband, claiming that she had by recovering the real estate devised by her husband renounced his will, and that she was entitled to the same interest in his personal estate as if he had died intestate. The trial court held that by recovering the land in fee and thereby defeating the intentions of the testator, his widow was precluded from claiming as legatee, and that her failure to renounce the provisions of the will in her favor, in the manner and within the time prescribed by statute, precluded her from claiming as distributee of the personal estate, if such renunciation would, after the election she made, have conferred such right, and that consequently her devisee and personal representative was not entitled to recover upon either ground. Upon appeal that decree was affirmed by this court.

These cases and the authorities cited in them show, not only that the widow has the same right of election as other persons where her husband disposes of her property and also makes provision for her by his will, but they also show that such election may be made expressly or impliedly. In the last cited case,

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it was held that claiming the land devised, by title paramount to the will, suing for and recovering it from the parties interested under the will, was not only an election to take against the will, but was an actual taking in contravention of the will.

There can be no question of the election of the widow of Richard Freeman to claim the "Ross parcel" of land as her own by title paramount to the will. Her action in conveying it in fee simple, with covenants of general warranty, can be explained in no other way. Being the owner of the Ross parcel by title paramount to the will, and having elected to take against the will, she had the right to sell and convey it to any one who desired to purchase, whether that person was a devisee, or legatee under her husband's will, or a stranger to it. This being so, it clearly appears that the alleged defect in the appellee's title is groundless, and that she is entitled to have the agreement sued on specifically enforced.

The trial court properly so decided, but its decree does not conform as clearly as it ought to the terms of the agreement of sales. No good reason existed why the appellant should be required to carry out the terms of the contract on his part and yet be denied the right to execute a deed of trust to secure the payment of the purchase money bonds not yet due, as he had the right to do under the agreement. See *Watts v. Kinney*, 3 Leigh. 293, 23 Am. Dec. 266.

In so far, therefore, as the decree appealed from varies the terms of the agreement of sales beyond what was rendered necessary by the fact that further installments of purchase money had become due and payable, it is erroneous, and to that extent should be corrected; but, as another installment of purchase money has become due since that decree was entered, this court will not modify it, but will affirm it in all other respects, and remand the cause to the Circuit Court for further proceedings to be had not in conflict with the views expressed in this opinion, awarding costs to the appellee as the party substantially prevailing.

Corrected and affirmed.

Statement.

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RANKIN AND OTHERS v. TOWN OF HARRISONBURG.

November 23, 1905.

1. **EMINENT DOMAIN—Raising Dam—Riparian Owners—Compensation.**
—Where the effect of raising a dam in a river is to flood its banks, impose upon its bed a greater volume of water, destroy fords, render adjacent lands more liable to overflow, and greatly to alter the natural flow and condition of the stream, adjacent riparian proprietors affected thereby are entitled to compensation from the person asking to have the dam raised.
2. **PAROL AGREEMENT—Water Power—Pendente Lite Deed.**—A parol agreement between the owners of opposite banks of a stream to divide between themselves in designated proportions the compensation to be received for the power furnished by the stream, whether the same should be granted by the owners or taken and appropriated against their consent, if fairly entered into between the parties, is mutually binding on them, and they may lawfully execute a deed carrying such agreement into effect pending proceeding to condemn the power.
3. **EMINENT DOMAIN—Power Furnished by a Stream—Rights of Riparian Owners.**—Riparian owners have a right to a stream flowing through their lands in its natural condition, and may protect that right not only for present needs but for possible future ones; and, although no one of the riparian proprietors owns the banks on both sides of the stream, nor has the right to erect a dam across it, and no two or more of them, as co-tenants, owns said banks or have the right to erect a dam across it, yet each owns an interest in the power furnished by the stream, although not actually applied, which may be united in one ownership, or be held as co-tenants, and this interest cannot be taken for public use without making just compensation to the owner thereof.

Error to a judgment of the Circuit Court of Rockingham

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county, in a condemnation proceeding instituted by the town of Harrisonburg. Judgment for plaintiff. Defendants assign error.

Reversed.

The opinion states the case.

Sipe & Harris, for the plaintiffs in error.

T. N. Haas and *J. B. Stephenson*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

The town of Harrisonburg gave notice to Henry L. Rankin and others that at the November term of the Circuit Court of Rockingham county, it would apply for leave to raise the dam across the Shenandoah river, which it had acquired under a conveyance from the Rockingham Milling Company, from a height of five feet to fifteen feet, in order to secure water power for an electric light plant for the use of the town. This notice was served upon divers persons owning land abutting upon the river, and in due course commissioners were appointed, who submitted a report to the court, to which numerous exceptions were filed. Some of these exceptions have reference to the form of the proceedings, and are brought to the attention of this court in the petition for a writ of error; but at the hearing it was agreed that all errors merely of procedure should be waived and that our judgment should be rendered upon the controlling question in the case, arising upon the tenth paragraph of the report of the commissioners, which is in the following words:

"From the end of the eddy or back water of the old dam at the Shaver or Ammon mill site, which was five feet high, up to the river to the end of the eddy or back water which will be made by the new dam, a distance of about a mile and a half, there is a fall of about ten feet in the river which the applicant gets the benefit of in the development of its power by raising the

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dam from the elevation of the said old dam to the height of fifteen feet. This ten feet of fall occurs in that part of the river which is abutted by the lands of Dr. Rankin and Mrs. Burke on the east or south and by the lands of Mrs. Walker on the west and north. Your commissioners ascertain that the water power gained by the applicant by this ten feet of fall through the lands of Rankin, Burke and Walker, as aforesaid, is worth the sum of three thousand dollars (\$3,000.00), and that the applicant shall pay the sum of \$3,000.00 as compensation therefor.

"It appeared by statement of counsel of Mrs. Walker, Mrs. Burke and Rankin, that it was agreed by their said clients that the compensation to be allowed for this water power owned by them should be divided among them in the proportion of one-half to Mrs. Walker, one-fourth to Dr. Rankin and one-fourth to Mrs. Burke. Your commissioners therefore report that, of the said sum of \$3,000.00 to be paid by applicant as compensation for said ten foot fall in the river, through the lands Mrs. Walker, Mrs. Burke, and Dr. Rankin, as aforesaid, \$1,500.00 thereof shall be paid to Mrs. Walker, \$750.00 thereof shall be paid to Mrs. Burke, and \$750.00 thereof shall be paid to Dr. Rankin."

The town of Harrisonburg excepts to paragraph ten of the report, by which it is required to pay \$3,000 as compensation for the water power, on the ground, that "the said supposed water power for which said compensation or damages of \$3,000.00 is found and allowed, is not proper to be taken into consideration as an element of damages to be compensated for by applicant, because there is no developed or existing water power in the distance mentioned in said report through which the eddy water of the proposed dam of applicant will extend, and no such power can, under the physical conditions existing, be created or developed without the construction of a dam across the river, and neither the said three persons, nor any two of them, as co-tenants, nor any one of them in severalty, own

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or owned both banks of the river, or land on both banks, in the distance measured by said eddy water, nor do they or any two of them, as co-tenants, or any one of them severally, own the right to abut a dam on both banks of the river at any place within the said distance, but they, the said three persons, own their lands in severalty, the land of Mrs. Walker laying on one side of the river, and the lands of Mrs. Burke and Dr Rankin lying on the other side of the river, the middle of the river being the boundary of said lands; wherefore it cannot be said that any one of them separately possesses, or that all or any two of them jointly possess, a water power to be damaged or compensated for as such."

Upon the issue thus presented the Circuit Court decided in favor of the town of Harrisonburg, and refused to allow any compensation to Henry L. Rankin, Columbia J. Burke and Emma E. Walker, but provided that the town of Harrisonburg should, at its expense, "construct where the private ford now is across the said Shenandoah River, just above the three springs, and connecting the land of said Henry L. Rankin, on the east side of the river, with the land of said Emma E. Walker, on the west side, or immediately nearby, and in lieu of and as compensation for the destruction of said ford by the reflux water, a suitable and adequate ferry, which ferry the applicant shall forever maintain and keep in repair, but shall not be required to man or operate it, the same to be appurtenant to the farms of said Henry L. Rankin, Columbia J. Burke and Emma E. Walker and for the use of the owners thereof without charge," etc.

To this order, Rankin, Burke and Walker obtained a writ of error.

The facts set out in paragraph ten of the report of the commissioners, and in the exceptions filed by the town of Harrisonburg, show, that there has been an actual taking of the property of plaintiffs in error for the use of the defendant in error. The plaintiffs in error own the lands abutting upon the stream;

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they own its banks and the bed over which the water flows. The effect of raising the dam to an additional height of ten feet is to throw back the water of the river for a long distance beyond the boundary line of plaintiffs in error, to flood its banks, impose upon the bed a greater volume of water, destroy the ford, render the adjacent lands more liable to overflow, and greatly to alter the natural flow and condition of the stream. This would of itself entitle the plaintiffs in error to compensation.

“Although, as will be seen in a subsequent section, there are a few cases which apply to the damming back of water, the rule that to entitle one riparian owner to complain of acts of another he must show that he has been injured, those decisions are not only against the weight of authority, but also are unsupported by principle. Any swelling of the stream over the line is an invasion of the rights of the upper owner, who has a right to the stream in its natural condition, which he may protect, not only for present needs, but for possible future ones. It constitutes a direct trespass upon his property which he may seek the aid of the courts to redress, and he is not bound to show that he is specially injured to maintain the action. The right of the upper owner is strengthened if injury is done to him, as by the flooding of a building, or of a mining claim, or of a ford. . . . As a general rule, a riparian proprietor is restricted in the management of his property by the maxim, *Sic utere tuo ut alienum non laedas*, and he cannot take the initiative and construct a dam on a stream that will cause the water to overflow and injure the land of his neighbor, that may lie opposite or above his own premises, either when the water is at its usual height, or in an ordinary freshet; or that so obstructs its flow as to prevent the land of the other riparian proprietor from being properly drained. The maxim of the common law, that the owner of the soil has absolute dominion over it above and below the surface, and that damage caused to others by his rightful command over his own soil is

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damnum absque injuria, has no application to such a case. Throwing the water back on the upper land is a nuisance in and of itself, of which the upper owner may complain whenever he desires to do so, whether it is a direct injury to him or not. He has a right to have his land free from the water and can object to its presence whenever he chooses; and the lower owner has no right in the premises." 2 Farnham on Waters and Water Rights, sec. 547.

Nor do we find anything in the case of *Mumpower v. City of Bristol*, 90 Va., 151, 17 S. E. 853, 44 Am. St. Rep. 902, which militates against this view of the law. In that case it was held that "the owner of a dam cannot enjoin the owner of a dam above from damming back water for operating his machinery, although such use at times keeps back the water to the extent of depriving the lower owner of water." The facts in that case and the law applicable to them bear no analogy to the subject now under consideration.

It further appears that, anticipating the objection successfully urged before the Circuit Court by the town of Harrisonburg, plaintiffs in error entered into a verbal agreement that the "compensation to be received for the said water power, whether the same should be granted by the owners or taken and appropriated against their consent, should be distributed among those owning the premises in the proportion of one-half to Mrs. Walker and one-fourth each to Rankin and Mrs. Burke;" and on the 25th of January, 1905, while this proceeding was pending before the Circuit Court, they executed a deed, *inter se*, by which they bound themselves to carry into effect this verbal agreement. When, in answer to the objection urged by the town of Harrisonburg, that no one of plaintiffs in error "separately possesses, or that all or any two of them jointly possess, a water power to be damaged or compensated for as such," this agreement was offered in evidence, objection was made

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to the verbal agreement on the ground that it was void under the statute of frauds, and to the deed, that it could not take effect because it undertook to change the title to the property in dispute *pendente lite*.

If the statute of frauds applies, it must be because it is a contract for the sale of real estate, or for the lease thereof for more than a year. There is no other provision of the statute of frauds which can have any bearing upon it. If the parol agreement must be held to be void upon that ground—that is, as being a contract for the sale of real estate—it would seem to be conclusive of the first question considered, that is to say, that an interest in real estate belonging to plaintiffs in error was being taken for the use of defendant in error. But assuming, and there is nothing to the contrary, that the parol agreement was fairly entered into between the parties, it was mutually binding upon them, and it was proper for them to execute the deed which carried it into effect.

But however that may be, there is another view of the case which seems to be conclusive. It is not denied by defendant in error that plaintiffs in error in severalty own parcels of real estate, which, if united in one ownership, or if held as co-tenants, would constitute an entirety of much value. The contention is, that “there is no developed or existing water power in the distance mentioned in said report through which the eddy water of the proposed dam of applicant will extend, and no such power can, under the physical conditions existing, be created or developed without the construction of a dam across the river, and neither the said three persons, nor any two of them, as co-tenants, nor any one of them in severalty, own or owned both banks of the river, or land on both banks, in the distance measured by said eddy water, nor do they or any two of them, as co-tenants, or any one of them severally, own the right to abut a dam on both banks of the river at any place within the said distance.” They owned, however, in severalty, rights as abutting owners upon the river, which if held as co-

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tenants, or if brought under the control of a single owner, constitute a valuable property right. If that be so, it is plain that the right to constitute themselves co-tenants, (as they unquestionably had a lawful right to do before the interference with that right on the part of the town of Harrisonburg), would be made valuable by which interests held in severalty, and which existing in severalty are valueless according to the argument of the town of Harrisonburg, is of itself a thing of value; and that right is destroyed, if the town of Harrisonburg be allowed to come in and condemn the share of one or of two, as completely as though the whole had been taken.

And again, it cannot be denied that if the town of Harrisonburg can acquire the rights now held by plaintiffs in error, it will have obtained property of very considerable value. Can it be that it can come in and by force of the right of eminent domain take without compensation the several parts constituting a valuable entirety? The sum of the parts is equal to the whole, in law and in logic, and if the entirety be of value the parts which constitute the entirety must potentially be of an equal value.

Water privileges and water power can now be put to uses not dreamed of in the past. By the generation of electricity power can be transmitted to a distance, no absolute limit to which has yet been fixed, and thus becomes subservient to all the uses to which, in the marvelous growth of modern industry, force in its varied manifestations of heat, light and motion is applied. Water power, therefore, so far from being less valuable than heretofore, acquires an additional value as the possibilities of the generation and transmission of force by means of electricity are from day to day disclosed, and the courts should be careful not to introduce or to sanction refinements, by which the value of those rights to riparian owners may be diminished or impaired.

Having reached the conclusion that plaintiffs in error were

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entitled to recover damages, we think the evidence sufficient to justify the amount awarded them in paragraph ten of the report, and that the judgment of the Circuit Court should be reversed.

Reversed.

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Richmond.

DONABLE'S ADMINISTRATOR v. TOWN OF HARRISONBURG.

November 23, 1905.

1. MUNICIPAL CORPORATIONS—*Ultra Vires* Acts—Operating Stone Quarry.

—In the absence of express authority, by charter or other positive enactment, a municipal corporation has no power to operate a stone quarry outside of its corporate limits, and is not liable for an injury negligently inflicted on an employee while it is operating such quarry. It is immaterial that the stone is to be used for the repair of streets which it is required to keep in order. The one power is not incidental to the other, and the operation of the quarry is an *ultra vires* act, and the municipality is not liable for its negligent performance.

Error to a judgment of the Circuit Court of Rockingham county, in an action of trespass on the case. Demurrer to declaration sustained. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Sipe & Harris, Chas A. Hammer and D. O. Dechert, for the plaintiff in error.

T. N. Haas, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This is an action on the case against the town of Harrison-

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burg, to recover damages for the death of plaintiff's intestate, caused by an explosion of dynamite at a rock quarry operated by the defendant outside of its corporate limits, at which quarry the decedent was employed as a laborer.

The defendant demurred to the declaration upon the ground that the operation of a rock quarry by the defendant outside of its corporate limits was an *ultra vires* undertaking, and, therefore, the defendant was not responsible in damages for the injuries to the decedent, which demurrer was sustained, and to that judgment of the Circuit Court this writ of error was awarded.

It is sought to distinguish this case from that of *Duncan v. City of Lynchburg*—decided by this court February 8, 1900, and reported in 2 Va. Dec. 700, 34 S. E. 964, 48 L. R. A. 331 by the fact alleged, that the stone gotten out by the decedent and others was to be for use on the streets of the defendant town, whereby this getting out of the stone was a mere incident of the work in which the town was engaged in the repair and maintenance of its streets, a work not only authorized but imposed upon the town as a duty by its charter. In other words, that the work in progress being primarily the repair and maintenance of the streets of the town, which is not only within the powers of the town but one of its absolute duties, and one of the considerations for the granting of its charter, for the failure in the performance of which duty the town is liable to respond in damages to any person injured in consequence of such failure, it is within the discretion of the town council, so long as the means adopted by it are such as to meet the requirement that the streets shall be kept in proper and safe condition for travel, to determine what means of repair and maintenance shall be used.

If that proposition could be maintained, a municipality might engage in limitless undertakings not authorized by its

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charter in express words, or necessarily and fairly implied in or incidental to the powers expressly granted, the result of which would be to expose the resources of the municipality to constant danger of exhaustion.

The following statement of the law by Dillon, in his work on *Municipal Corporations*, sec. 89, has been often quoted with approval by this court, viz: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incidental to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied." *Redmond v. Winchester*, 93 Va. 711; 25 S. E. 1001, 57 Am. St. Rep. 822; *Wallace v. Richmond*, 94 Va. 217, 26 S. E. 586, 36 L. R. A. 554; *Railway Co. v. Dameron*, 95 Va. 545, 28 S. E. 951; *Duncan v. Lynchburg*, *supra*.

It is equally well settled law that a municipal corporation is, as a general rule, restricted to its corporate limits in the exercise of its corporate powers. *Duncan v. Lynchburg*, *supra*; *Becker v. LaCrosse*, (Wis.), 75 N. W. 84, 67 Am. St. Rep. 874, 40 L. R. A. 829; *Mayor of Detroit v. Park Com'rs*, 44 Mich. 602-605, 7 N. W. 180; Teidman on Mun. Corp. sec. 62; 2 Dillon on Mun. Corp., sec. 565.

In *Duncan v. Lynchburg*, *supra*, the city of Lynchburg was operating a rock quarry outside of the city limits, in the course of which a nuisance was created, and suit was brought to recover damages of the city by reason of the nuisance; but it was held that the operation of the rock quarry was *ultra vires*, and therefore the city was not liable in damages, the grounds upon which the undertaking was held to be *ultra vires* being: First,

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because neither the charter nor the general law gave the city authority to operate a rock quarry; and, second, because the operation of the quarry was carried on outside of the corporate limits.

The general law was the same at the time of the accident out of which the suit arises as it was when the case of *Duncan v. City of Lynchburg*, *supra*, arose, and the charter of Harrisonburg grants no power to operate a rock quarry, either within or without the town, unless it arises by implication out of the powers granted to keep its streets in order, to provide work-houses and houses of correction and reformation, and to establish and operate a sewer system, water works, gas works, electric lights works, etc., all of which powers were conferred upon the City of Lynchburg by its charter; so that the principle of law applied in the case of *Duncan v. Lynchburg* is clearly applicable to this case.

In the former case, speaking with reference to the opinion expressed by Judge Dillon, that for some purposes, such as for the establishment of a pest-house or a cemetery, a municipal corporation may acquire land outside of its territorial boundaries, the opinion by Buchanan, J., says: If this be true, it must be because the lands are indispensably necessary to enable it to protect the health and well-being of its people;" and further: "It might be convenient for a municipal corporation to own and operate a rock quarry, but is manifestly not indispensably necessary that it should do so in order that it may accomplish the objects of its creation."

The case of *Becker v. LaCrosse*, *supra*, is an authority in point here, not only for the proposition that a municipal corporation is not liable in damages for an *ultra vires* act, but also for the proposition that an undertaking carried on by a municipality outside of its limits is, in the absence of express authority, *ultra vires*. See also *Cavanaugh v. Boston*, 1 N. E. 834, 52 Am. Rep. (Mass.), 716 and *Albany v. Cundiff*, 2 N. Y. 165.

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Authorities are cited by the plaintiff for the proposition that *private corporations* are liable for damages arising out of a tort, though the act in which the tort was committed be *ultra vires*, but they have no application here. While the powers of a private corporation are bestowed and limited by charter, they act for themselves, in their own right, and in the pursuit of gain. On the other hand municipal corporations exercise delegated powers and act through their officials as a local agency for the exercise of governmental functions. With reference to the liability of municipal corporations for damages arising out of the negligence of its agents, Judge Dillon says: "To create such a liability it is fundamentally necessary that the act done which is injurious to others must be within the scope of the corporate powers, as prescribed by charter or positive enactment (the extent of which powers all persons are bound, at their peril, to know); in other words, it must not be *ultra vires* in the sense that it is not within the power or authority of the corporation to act in reference to it under any circumstances."

The argument of the learned counsel for the plaintiff in this case, that "to hold that although it is one of the imperative, unescapable duties of the town to keep its streets in repair, yet all the work and transactions incidental thereto must be wholly performed within the corporate limits of the town, would be to impose most unfortunate limitations upon the town," might be much more properly addressed to the law-making power of the State than to the courts. It might be convenient, and even profitable, for the defendant to operate a rock quarry outside of its corporate limits, in order to obtain material suitable for repairing and keeping in order its streets, but without legislative authority it has no power to do so, and clearly no such power is in express words conferred in its charter, nor necessarily or fairly implied in or incidental to the powers expressly granted.

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It follows that the defendant was not liable in damages for the death of the plaintiff's intestate, that the demurrer was properly sustained by the trial court, and that the judgment must be affirmed.

Affirmed.

Syllabus.

Richmond.

CHESTNUT v. CHESTNUT.

November 23, 1905.

1. NEGOTIABLE INSTRUMENTS—*Blank as to Amount—How Filled—Incompleteness.*—Where a blank in the body of a negotiable note for the amount thereof is left unfilled, the instrument is incomplete, and there can be no recovery on it; but it is not invalid simply because incomplete. It creates certain rights and obligations, and, when properly filled up by a *bona fide* holder, may be enforced at law, or, if left blank by mistake, the mistake may be corrected in equity.
2. NEGOTIABLE INSTRUMENTS—*Blank as to Amount—Amount in Margin—Use of Margin.*—The amount for which a negotiable note is made out must be clearly expressed in the note, and if the blank for the amount in the body of a note be left unfilled, its place cannot be supplied from the margin whether written out in full or expressed in figures. The margin may be used to remove an ambiguity in the body of the note, or to clear up a doubt, but not to supply a blank.
3. NEGOTIABLE INSTRUMENTS—*Blank as to Amount—Use in Evidence—How Blank Filled.*—Where the amount of a negotiable note is expressed in the margin but not in the body of the note, the note cannot be used in evidence to support an averment in the declaration of the making of a note for the sum stated in the margin, but the delivery of such a note is generally authority to a *bona fide* holder to fill the blank for the true amount due not exceeding the amount stated in the margin, and if the plaintiff, who is the payee of the note, has not lost the right by unreasonable delay or otherwise, he may, in the absence of evidence that the blank was left by mistake, fill the blank in the body of the note with the amount agreed on with the maker, and so make the note conform to the averments of his declaration.

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4. PLEADING—*Proof of Handwriting—Affidavit*.—Where the declaration alleges that the defendant made the note sued on, the defendant cannot deny the execution of the note unless his plea is accompanied by an affidavit putting that fact in issue. Code, sec. 3279.
5. PLEADING—*Grounds of Defense—Insufficient Statement*.—If a defendant's grounds of defense, when called for, are not sufficient, the court should require a further and sufficient statement to be filed, and if not furnished to exclude evidence of any matter not described in the grounds of defense, or plea, so plainly as to give the plaintiff notice of its character. Code, sec. 3249.

Error to a judgment of the Circuit Court of Highland county, in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Braxton & McCoy, J. W. Stephenson and C. P. Jones & Son,
for the plaintiff in error.

J. B. Stephenson, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

Several errors are assigned in the petition for the writ of error, but the principal one is to the action of the court in permitting the plaintiff to offer in evidence a paper of which the following is a copy:

“Monterey, Va., June 6, 1892.

“\$1,800. Eighteen hundred dollars.

“Three months after date.....promise to pay to the order of J. A. Chestnut dollars, negotiable and payable at the Highland County Bank, Monterey, Va.

Homestead and all other exemptions waived by the maker and each endorser.

Value received.

No..... Due.....

“NANCY J. CHESTNUT.”

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The objection made to its admissibility is that it is not, as alleged, a promissory note, and in its present form does not evidence a promise to pay or create any liability on the defendant.

The propriety of the court's ruling depends upon the question, whether or not the figures and words in the margin of a note fix the amount for which the note was intended to be given, where no amount has been inserted in the blank left for it in the body of the note. Upon this question the decisions of the courts are not in accord, though the weight of authority, and the better reason, seem to be in favor of the view that the sum named in the margin is generally the limit of the amount with which a *bona fide* holder may fill up the blank, but until so filled the instrument is incomplete, and no recovery can be had upon it. See Daniel on Neg. Instr., ss. 86, 86a, and 143; 8 Am. & Eng. Ency. Law (2nd Ed.), 130, and cases cited; 7 Cyc., 593-4 and cases cited; *Garrard v. Lewis*, 10 Queen's Bench Div. 30; *Norwich Bk. v. Hyde*, 13 Conn. 281; *Patton v. Shanklin*, 5 B. Monroe 15; *Hollen v. Davis*, 59 Ia. 444, 13 N. W. 413, 44 Am. Rep. 688; *Edwards v. Ramsey* (Minn.), 14 N. W. 272; *Schryver v. Hawkes*, 22 Ohio St. 308, 315.

The reason for this rule of construction is that one of the essential requisites of a bill or note is that the amount for which it is made must be clearly expressed in the instrument, and as the marginal figures are not generally regarded as a part of it, but are intended as a convenient index, and as an aid to remove ambiguity or doubt in the instrument itself, they cannot supply the omission to insert the amount in the body of the instrument where a blank has been left for that purpose. The blank in such an instrument is presumably intended to be filled with something, and until that something has been added the instrument is not complete. It is not invalid simply because it is incomplete. It creates certain rights and obligations, and when properly filled up by a *bona fide* holder may be enforced

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at law, or, if left blank by mistake, in equity. See *Garrard v. Lewis, supra*; *Norwich Bk. v. Hyde, supra*; *Frank, &c. v. Lilienfeld, &c.*, 33 Gratt. 377, 383-387; *Orrick v. Colston*, 7 Gratt. 189.

The fact that the amount in the margin of the note in this case is expressed in words as well as figures cannot, as it seems to us, affect the question. The refusal of the courts to allow the amount of a note or bill to be supplied from the margin where there is a blank left for the amount in the body of the instrument, is not because the amount in the margin is expressed in figures, but because it is in the margin and not in the body of the instrument.

In the case of *The Norwich Bank v. Hyde, supra*, which is a leading case on the subject, the question involved was substantially the same as in this case, both as to the defect in the note and the manner in which the objection to it was raised. The note in that case was as follows:

“Norwich, Ct., Feb. 6, 1837.

“\$200.

“Sixty days after date, for value received, I promise to pay to the order of Amos D. Allen dollars, at the Quinebaug Bank.

“OLIVER ALLEN.”

“It is a well settled principal,” said the court in that case, “that no precise form of words is necessary to constitute a note or bill of exchange; yet all the authorities agree that the sum must be specified so that it may be definitely known what sum was intended. Indeed it seems to be the first principle, that the sum to be paid must be clearly and intelligibly expressed. *Chit. on Bills*, part 1, ch. 3, § 11; *Beawes L. M.*, § 193. Does this note then clearly and intelligibly import a promise to pay 200 dollars, or does it appear to be an imperfect instrument?

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"The question upon this declaration is not whether this may not properly be made a valid instrument, but whether in its present shape it is precisely what it would have been had it been filled up in the usual manner? If we so hold, what becomes of the rule above stated, that the sum must be clearly and intelligibly stated in the body of the instrument? Would not its appearance tend to impede its currency and clog its circulation? It certainly would be a very loose mode of doing business in cases which seem to require great accuracy, and one to which we cannot assent unless we find it settled by authority."

Upon a review of the authorities, the court reached the conclusion that the aid which the margin is to give in construing a note or bill, is to remove an ambiguity in the body of the note, or to clear up a doubt; not to supply a blank.

How the margin will assist in removing a doubt as to the meaning of the body of the instrument, is illustrated in *Elliot's Case*, Leach's C. L. 183. In that case the body of the note was for fifty . . . ;" in the margin "£50." The court supplied the word "pounds" from the margin.

In other cases, where there was no sum in the margin to aid, the courts have supplied an omitted word where it was clear from other parts of the instrument what the omitted word was. This is illustrated by the decision of this court in *Harman v. Howe*, 27 Gratt. 676, where the sum to be paid was stated as "seven hundred and seventy-six in lawful money of Virginia." The court supplied the word "dollars," because it was clear, as was said by Judge Moncure in delivering the opinion of the court, from the context of the bond sued on what the omitted word was.

It does not follow, however, because the blank for the amount of a bill or note has not been filled up, that a *bona fide* holder shall lose the debt which such instrument was intended to evidence, or be deprived of his security. If the blank was left unfilled by mistake, a court of equity may correct the mistake. Generally, any *bona fide* holder of a bill or note signed in blank

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has authority to fill the blank with any sum not exceeding the limitation in the margin which the transaction between him and the person from whom he received it will warrant. *Norwich Bk. v. Hyde, supra*; *Garrard v. Lewis, supra*; 7 Cyc., 593-4; 4 Am. & Eng. Ency. L. (2nd Ed.), 130-1; *Frank, &c., v. Lilienfeld*, 33 Gratt. 377, 383.

In *Frank, &c., v. Lilienfeld*, 33 Gratt. 377, 383, this court held, that where a party to a negotiable note intrusts it to the custody of another with blanks not filled up, whether it be for the purpose of accommodating the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its own face an implied authority to fill up the blanks and perfect the instrument.

In the absence of evidence that the blank in the paper sued on in this case was the result of a mistake, the presumption is that the payee, who is still the holder thereof, had the right to fill up the blank with any amount agreed upon between him and the maker, and that right still exists, unless its exercise, in the opinion of the jury upon all the facts and circumstances of the case, has been unreasonably delayed. The plaintiff would, therefore, seem to have in his hands, as was said in *The Norwich Bank v. Hyde, supra*, the materials to make his note and declaration correspond; although, in the present state of the note, he might as well attempt to prove his case "by introducing the bare name of the maker upon one side of a paper, and that of the defendant on the other. And yet, in that case, upon well settled principles, a *bona fide* holder might fill up such a paper so as to shape it to the case; the rule being that where a man gives his name in blank it is a letter of credit for an indefinite amount. *Russel v. Langstaffe*, Doug. 514; *Mitchell v. Culver*, 7 Cowan. 336." *Frank, &c., v. Lilienfeld, supra*.

Thus we see that the objection to the note when offered in evidence ought to have been sustained, since it did not corre-

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spond with the note declared on. But we further see that it may be in the power of the plaintiff to make it such as he has described it to be in his declaration, so as to render it admissible in evidence.

Another assignment of error is to the action of the court in refusing to permit the defendant to testify that the note sued on was signed in blank; the purpose for which it was signed; the amount to be inserted in the blank; that she did not execute any note to the plaintiff for \$1,800; and that she was not indebted to him at the date of the note.

The bill of exception does not show upon what ground the evidence was objected to by the plaintiff or held inadmissible by the court. The plaintiff's contention here is that the defendant had no right to prove that she did not execute the note because no affidavit was filed with her plea of non-assumpsit denying that she had made the note, in order to put that question in issue as required by section 3279 of the Code; and that the other evidence rejected was not admissible because the matters sought to be established by it were not so plainly described in the statement of her grounds of defense as to give the plaintiff notice of their character, as required by section 3249 of the Code.

In the absence of the affidavit provided for by section 3279 of the Code, the court was clearly right in refusing to permit the defendant to prove that she did not make the note declared on. Neither was the defendant's statement of her other grounds of defense sufficient. It gave the plaintiff no more notice of her defense than the plea of non assumpsit. But the court, when that statement was objected to by the plaintiff, ought to have required a further and sufficient statement to be filed, and if such statement was not furnished, to have excluded evidence of any matter not described in the grounds of defense so plainly as to give the plaintiff notice of its character. But instead of requiring such statement, the court overruled the plaintiff's motion, thereby impliedly holding that the statement objected to was sufficient.

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The proper practice as to filing bills of particulars and statements of grounds of defense was discussed, Judge Riely delivering the opinion of the court, in the case of *Columbia Accident Association v. Rokey*, 93 Va., 678, 683, 25 S. E. 1009. By following the practice pointed out in that case in the next trial, the error complained of will be avoided.

Other errors are assigned, but as they are not likely to occur upon the next trial, it is unnecessary to consider them.

The judgment must be reversed because of the erroneous admission in evidence of the note sued on in its then incomplete condition, the verdict of the jury set aside, and the cause remanded for a new trial.

Reversed.

Statement.

Richmond.

JOHNSTON'S ADMINISTRATOR v. MOORE LIME CO.

November 23, 1905.

1. DEMURRER TO EVIDENCE—*Case at Bar—What Jury Might Have Found—Master and Servant—Safe Instrumentalities.*—Upon the demurrer to the evidence in this case by the defendant, the jury might have found that the explosion of the engine which caused the death of plaintiff's intestate was because it had been rendered unsafe by the removal of the drip cock which had been upon it, and that in removing it the defendant had failed in its duty to exercise that reasonable care to provide reasonably safe instrumentalities which the law imposes, and that the danger to which the plaintiff was subjected *was not* so open and obvious as to charge him with contributory negligence, and, as the jury might have so found, it was the duty of the trial judge so to have decided and to have rendered judgment for the plaintiff.

Error to a judgment of the Circuit Court of Botetourt county, in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Reversed.

The opinion in 103 Va. 84, in connection with the present opinion sufficiently states the case.

Benjamin Haden and *Wm. R. Allen*, for the plaintiff in error.

James L. Shelton, for the defendant in error.

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KEITH, P., delivered the opinion of the court.

This is the sequel to the case of *Moore Lime Company v. Johnston's Administrator*, 103 Va. 84, 48 S. E. 557. We refer to that opinion for a discussion of the evidence, as it then appeared in the record. For reasons there set forth the case was, upon the petition of the Moore Lime Company, reversed and remanded for a new trial. Upon the new trial there was a demurrer to the evidence, a verdict of the jury in favor of Johnston's administrator, and a judgment upon the demurrer in favor of the Moore Lime Company; and the proceedings culminating in the latter judgment are before us for review.

Counsel for plaintiff in error fully concedes the correctness of the former judgment of this court, and the conclusive force of the reasoning upon which it was based, but insists that the record now before us entitles his client to a recovery.

After a careful review of the evidence, we are of opinion that it presents a case which should have been submitted to the jury, both upon the question of the negligence of the defendant in error, and upon the allegation of contributory negligence on the part of plaintiff in error's intestate.

There is evidence which tends to prove that upon the morning of the accident the young man, whose death is the subject of this suit, had gotten up steam in his boiler; that there was the proper gauge of water in the boiler; that the steam had not been turned on the machinery; and that the machinery and no part of it had been put in motion; that, having gotten up the steam and while waiting for the signal to turn it on, he had "cracked the valve"—that is to say, he had opened it slightly so that the water which had accumulated in it from the preceding Saturday might gradually escape; that it was necessary to do this, and that it was done in the accustomed manner. It appears that the accumulation of water was the necessary result of the condensation of the steam which was in the pipes on the preceding Saturday, and that the cold weather then prevailing had frozen

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the water which had thus formed in the throttle valve, by reason of which it cracked, became unsafe, and burst. It appears that the engine had at one time been provided with a "drip cock" or "by pass," which had been removed, and the hole from which it was taken filled with an iron plug; that with this drip cock in position the water from the pipe would have been drained off, no ice would have formed, and the valve would not have been injured by the formation of ice. It further appears that it would not have been safe to have "cracked the valve" and left it in that position, as there was danger of starting the machinery. There is evidence to the effect that the engine in use by the Moore Lime Company prior to December, 1901, was equipped with a drip cock; that about that date another engine was put in, to which a drip cock was also attached until about two weeks before the accident; and that during the two weeks intervening between the removal of the drip cock and the plugging of the hole the weather was not so cold as it afterwards became; and that it turned cold on the 15th or 16th of March, and was very cold Sunday evening and Sunday night.

Upon these facts, considered as upon a demurrer to evidence, we are of opinion that the verdict should not have been disturbed. The jury was doubtless of opinion that the machinery had been rendered unsafe by the removal of the drip cock, and that in removing it the Moore Lime Company had failed in its duty to exercise that reasonable care to provide reasonably safe instrumentalities which the law imposes; and they were further of opinion that the change which rendered the throttle valve unsafe did not constitute a danger so open and obvious as to convict the employee who used it of contributory negligence, and of contributory negligence in any other aspect of the case there is no evidence whatever.

It is proper to observe that the evidence upon the last trial of this case varies in several material respects from that which was given on the first trial, which was found insufficient to maintain the verdict. Especially is this true with respect to the drip

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cock. The proof upon the first trial was that "there was no 'drip cock' to the throttle valve originally; and no provision made for its use, and the engine had been safely operated for years without that appliance. Indeed the 'drip cock' was first attached to the valve by Hammitt (who was employed by the defendant for one month as a machinist) in December, 1901, by drilling a hole through the globe valve and inserting the 'drip cock.' A short time before the accident happened, Fairburn, the successor of Hammitt, discovering that the 'drip cock' was out of order, removed it, and closed the hole with an iron screw plug, thus restoring the valve to its original condition." *Moore Lime Co. v. Johnston, supra.* The evidence now before us tends to show that prior to December, 1901, the engine then in use had a drip cock, and had never been operated without it; that the engine which was brought to the mill in December, 1901, was a second hand engine from Richmond; that it came "tapped" for a drip cock, and that in the fixtures that came with the engine there was a drip cock for the purpose of being placed there; that this latter engine, thus equipped, with a drip cock to the throttle valve, was so used until about a fortnight before the accident, at which time it was taken out and the hole filled with an iron plug. There was evidence upon the former trial which strongly tended to show, "that the proximate and efficient cause of the accident was the reckless conduct of plaintiff's intestate in suddenly starting the engine, which, according to the collective opinion of the witness, could not with safety be set in motion in less time than from two minutes to eight minutes;" (*Moore Lime Co. v. Johnston, supra.*) while upon this point the proof now before us is that the steam had not been turned on, but the valve had merely been "cracked."

We are of opinion that the judgment should be reversed, and this court will enter judgment upon the verdict for plaintiff in error.

Reversed.

Syllabus.

Richmond.**MOON'S ADMINISTRATRIX V. HIGHLAND DEVELOPMENT
COMPANY & OTHERS.**

November 23, 1905.

1. **SUBROGATION—Act of Limitations—Consent Decree—Cross Bill—Case in Judgment.**—For value received, land was conveyed to a trustee for the sole and separate use of a married woman, for and during the term of her natural life, with power to her to appoint the fee by will, which power she exercised in favor of her son and daughter in equal shares. The grantor reserved a lien in the deed for \$3,000. Pending the life estate the woman borrowed \$4,000 to pay off the aforesaid lien and accumulated interest, which was so applied. The woman and her husband executed their bond for the amount and united with her trustee, and the beneficiaries of the reserved lien, in a deed reciting the payment of the lien and conveying the land in fee to secure the \$4,000 loan. The title of the daughter to one-half the fee in remainder devolved upon her father the husband of the married woman. In a suit to settle up the father's estate and to pay his debts it is charged in the bill that the son is the owner of one-half of this tract of land, which is liable for half of the \$4,000 debt, and the father was the owner of the other half which was liable for the other half. The son was a party to this suit and consented to a decree charging his land with one half of the debt two days before the time at which it is alleged the debt became barred by act of limitation. The creditor secured in the \$4,000 debt was also a party to the suit, and, after the entry of said consent decree, filed a cross-bill against the son and others, setting out the lien reserved, the loan of the \$4,000 to pay it off, and its application thereto, the bond and deed above mentioned, and other proceedings in the suit, and asking to be subrogated to the rights of the creditor in the lien secured first above mentioned.

Statement.

Held:

- (1) The land devised to the son is liable for one-half the \$4,000 debt.
 - (2) The debt is not barred by the statute of limitations.
 - (3) It was a proper case for a cross-bill, and the demurrer there-to was properly overruled.
2. **EQUITY—Partition—Creditor's Bill—Parties—Adverse Claimant—Cloud on Title.**—Upon a bill filed for partition and for other purposes, where the decrees and proceedings in the case have made it in effect a creditor's bill for the satisfaction of liens due by the joint owners, and binding upon the estate to be partitioned, it is error to dismiss the bill as to a defendant asserting an adverse claim to the land, or a part thereof, which is to be sold to satisfy such liens. In such case all clouds upon the title should be removed, and the amounts and respective priorities of the liens thereon should be fixed and ascertained before any decree of sale is made.

Appeal from a decree of the Circuit Court of Highland county in the chancery suit of *Glendy's Admr. v. Glendy's Heirs*. In this cause a lien was asserted by Wood's Exor's which was contested by Moon's administratrix. From a decree establishing the debt and dismissing the cause as to the Highland Development Co., Moon's administratrix applied for and obtained this appeal.

Reversed in part.

The main facts in this case appear in the opinion of the court. After the case of *McAllister v. Harman*, 101 Va. 17, 42 S. E. 920, went back to the Circuit Court, the executors of Warner Wood filed their cross-bill, in which they ask to be allowed to enforce the Warner Wood debt spoken of in the opinion of the court. To this bill C. D. Glendy filed his demurrer and answer. He claimed that Mary J. Glendy had only a life estate with power of appointment, and that the Warner Wood debt was not lien on his land, and, further, that the right to enforce the debt was barred by the statutes of limitation. In his answer, he further set up the fact that he had sold the land to J. Yost, and conveyed it to him, and that, on the 27th day of April, 1903, the Highland Development Company had

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notified Yost that it was the owner of a large portion of the land; and, on the motion of the complainants in the cross-bill, the court ordered and decreed that the said Yost and the Highland Development Company be made parties defendant to the suit, and that the clerk of the court should forthwith issue process against them, returnable to rules, requiring, amongst other things, the said Highland Development Company to show what interest, if any, it had in the property involved in the cause, and to assert such interest, and that upon its failure to do so, a decree would be entered against it by default. The Highland Development Company never appeared. At a subsequent term of the court, on motion of William M. McAllister, trustee, one of the complainants in the original bill, the suit was dismissed as to the Highland Development Company. The language of the decree upon this point is as follows:

"It appearing . . . that the Highland Development Company claims by a title adverse to that of any party to this cause, and not by, through, or under any of said parties, or their grantors, a part of the C. D. Glendy land involved in this suit; and that the claim of said Highland Development Company is based on a grant from the Commonwealth adverse to the grant under which the other parties claim, and the court being of opinion that the title of the Highland Development Company cannot be properly tried in this cause, doth decide that the process against the Highland Development Company was improvidently awarded, and the said Highland Development Company is dismissed as a party to this suit."

Patrick & Gordon, for the appellants.

Daniel Harmon, John W. Fishburne, Micajah Woods and W. M. McAllister, for the appellees.

KEITH, P., delivered the opinion of the court.

Opinion.

A controversy between certain parties to this suit was disposed of at a former term of this court, and is reported under the style of *McAllister v. Harman*, 101 Va. 17, 42 S. E. 920.

The cause having been remanded to the Circuit Court, a decree was entered on the 29th of April, 1903, reviving it against the executors of Warner Wood, one of the defendants, and referring it to a commissioner to state an account showing the balance due upon the bond and lien proved in favor of Warner Wood; an account of the collections and disbursements made by McAllister, as general receiver of the court, by reason of the decree authorizing him as such receiver to collect from Lewis Harman and Carter Berkley the purchase money for the lands involved, showing the balance in his hands as such receiver and how the fund so collected by him had been applied (see *McAllister v. Harman*, *supra*); an account of all collections and disbursements made by McAllister, general receiver of the court, of funds involved in the cause, and the amount still due and uncollected on the rent account; an account showing the balance in the hands of McAllister, as trustee of Robert J. Glendy, and as administrator of R. J. Glendy, deceased; and an account of all the claims proved in the cause and to what extent and how any of said claims are payable and binding upon all the lands involved in the cause and which of said claims are payable exclusively by R. J. Glendy's estate, or are binding upon that part of the real estate assigned to the estate of R. J. Glendy; and to what extent, if any, Lewis Harman and Carter Berkley or their assignees may be entitled to reimbursement or subrogation by reason of payments made by them or either of them to William M. McAllister, general receiver.

Upon the coming in of this report it appeared that the first lien was for taxes; that in the second class were attachments issued by Barley and Thomas; in the third class, a sum due McAllister as receiver; fourth, the debt due Warner Wood; fifth, that of D. B. Taylor & Company; and, sixth, that of Julia A. Moon, administratrix of J. Sumnerfield Moon, with interest from December 1, 1904.

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To this statement of liens exceptions were filed by Warner Wood's executors and Julia A. Moon, administratrix, in which they unite in an attack upon the first three classes, and Julia A. Moon, in addition, attacks the debt of Warner Wood as not constituting a lien upon the land which had been assigned to C. D. Glendy.

The court overruled these exceptions and directed a sale of the moiety of land which had been assigned to R. J. Glendy; and with reference to that portion allotted to C. D. Glendy, and which appears to have been purchased by Jacob Yost, the decree provides that the said Yost may have sixty days from the adjournment of the court to notify the commissioners appointed to sell whether or not he proposes that his purchase shall be adopted as a judicial sale by the court, in which event the purchase money is to be paid to the commissioners, and if he fails to comply with the terms of his purchase, and C. D. Glendy, or some one for him, shall fail to pay the debt chargeable on that share of land within sixty days, then the commissioners were directed to sell that moiety of land also.

From this decree an appeal was obtained to this court.

The land in controversy belonged originally to Robert J. Glendy, who on the 20th of November, 1876, conveyed it to Hugh W. Sheffey, trustee, reciting in the deed that the grantor desiring to provide the means of paying his debts by the conveyance to trustees for that purpose of various tracts of land, in all of which Mary J. Glendy had a right of dower, and it being desirable that said Mary J. Glendy should unite in the deed of trust so as to secure a perfect title to the purchasers, and she having agreed to unite in said deed upon condition that Robert J. Glendy should convey to a trustee the property therein described and upon the trusts therein declared; therefore, the said Robert J. Glendy granted to Hugh W. Sheffey and his heirs certain land which he describes, known as "The Wilderness;" "but it is expressly understood that a lien is retained upon said Wilderness estate for the sum of three thousand dollars,

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payable in three equal annual payments with interest from this date and in favor of Hugh W. Sheffy and James Bumgardner, Jr., trustees for said Robert J. Glendy, under the trust deed aforesaid of even date with this deed." This conveyance of Nov. 20, 1876, was declared to be upon the following trusts: "That said Hugh W. Sheffy shall hold the property for the sole and separate use of said Mary Jane Glendy free from the debts and contracts of her husband, and in the event of the death of said Robert J. Glendy before the said Mary J. Glendy that said trustee will convey said real estate to the said Mary J. Glendy to hold it during her natural life with remainder in fee to such persons as she may by deed or will appoint, and in default thereof to her right heirs, and in case the said Mary Jane Glendy shall die before her said husband, then the said trustee will convey said real property to such persons as the said Mary Jane Glendy may in writing, attested by three witnesses, or by her last will and testament, designate and appoint, and in default of such appointment, to her children and the descendants of such as may be dead, *per stirpes*."

On the 8th of February, 1882, Robert J. Glendy and Mary J. Glendy, his wife, parties of the first part, H. W. Sheffy and James Bumgardner, Jr., trustees, created by the deed of Robert J. Glendy dated November 20, 1876, parties of the second part, and C. D. Fishburne and James Bumgardner, trustees, of the third part, and Warner Wood of Albemarle county, Virginia, of the fourth part, recite that whereas Robert J. Glendy and Mary J. Glendy, his wife, two of the parties of the first part, are indebted to the said Warner Wood in the sum of four thousand dollars, evidenced by their bond of even date, payable on demand with interest from date, which they desire more fully to secure to said Wood; and whereas there was in the deed first above referred to a lien reserved on the land thereby conveyed (which is the same land conveyed in the deed of February 8, 1882), to secure the payment of a debt of three thousand dollars with interest from 20th November, 1876, to

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Messrs. H. W. Sheffy and James Bumgardner, Jr., the trustees named in R. J. Glendy's general deed of trust (to-wit, the second deed hereinabove described), which last named debt has been paid in full out of said sum of four thousand dollars, as evidenced by the signatures hereto of said parties of the second part, who hereby release the land hereinafter conveyed from the lien reserved as aforesaid. Now, therefore, in consideration of the premises Robert J. Glendy and his wife, Hugh W. Sheffy as trustee of Mary J. Glendy and with her consent, convey to C. D. Fishburne and James Bumgardner, Jr., the "Wilderness," the "Fowler" and the two "Nelson" tracts, which are described in the deed, except 785 acres sold to various parties named in the deed; the whole quantity conveyed being 3,906 acres; in trust to secure to Warner Wood and his heirs the payment of the debt of four thousand dollars, with interest thereon till paid.

Mary J. Glendy died before her husband, leaving a last will and testament, by which she devised the whole of her estate both real and personal to her husband during his natural life, the personal property at his death to be disposed of as he might see fit and proper and "the real estate to be divided equally between my son Charles D. and daughter Edmonia Glendy, to be enjoyed by them forever." This will bears date the 3rd day of March, 1884, and was signed and sealed by the testatrix in the presence of three attesting witnesses, and was admitted to probate at the January term, 1885, of the County Court of Bath county.

Edmonia Glendy married a Mr. Bowler and died leaving a daughter who died under twenty-one years of age from whom Robert J. Glendy inherited one-half of the estate. By deed of the 17th of May, 1889, Robert J. Glendy conveyed the "Wilderness" estate to McAllister, trustee, to secure certain creditors therein named.

At April rules, 1890, William M. McAllister, as administrator and trustee of Robert J. Glendy, deceased, certain per-

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sons secured by the deed of May 17, 1889, and others, heirs at law of Robert J. Glendy, filed their bill, in which they set forth a debt to the Valley Bank of Staunton due by Robert J. Glendy and upon which some of the plaintiffs were endorsers, deduce the title of Robert J. Glendy to the "Wilderness" tract through the various deeds which we have recited, set forth the debt due by bond to Warner Wood and the payments upon it, and charge, "that the residue of said bond and interest is still due and unpaid, and constitutes a lien upon said Wilderness estate, one-half of which should be paid by the said C. D. Glendy and the remaining half whereof should be paid by the estate of the said Robert J. Glendy, deceased." They further charge that partition should be made of the said Wilderness estate between the said Charles D. Glendy and the estate of the said Robert J. Glendy, deceased, and that one-half of the trust debt due to Warner Wood should be provided for out of a sale of the half of said Wilderness estate which shall be allotted and assigned to the said Robert J. Glendy, and the other half made a charge upon the half assigned to C. D. Glendy. Charles D. Glendy, Warner Wood, and C. D. Fishburne and James Bumgardner, Jr., trustees in the deed to secure the debt of Warner Wood, are made parties and required to answer.

In August, Warner Wood and his trustees answered, and state that by deed dated February 8, 1882, Robert J. Glendy and his wife, Mary J. Glendy, conveyed the land therein mentioned and described to the defendants, James Bumgardner, Jr., and C. D. Fishburne, trustees, to secure the payment of their bonds to Warner Wood for \$4,000, as described in said deed of trust; that the deed of trust was executed also by Hugh W. Sheffy, as trustee of said Mary J. Glendy under deed of said Robert J. Glendy and wife, dated 20th November, 1876, and by said Sheffy and James Bumgardner, Jr., trustees in a general deed of trust by said Robert J. Glendy dated November 20, 1876, thus giving to said defendants as trustees the first lien on said land to secure said debt to Warner Wood; that

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the interest on said debt had been paid up to the 8th day of August, 1888, so that all the principal and interest on the same at 6 *per cent. per annum* is now due from the 8th of August, 1888.

Accounts were taken under this decree, and subsequently a contract of sale was made to Harman and Berkeley, and the suit growing out of that contract was before this court in the case of *McAllister, trustee, v. Harman, supra*.

By a decree entered on the 29th of April, 1903, which has already been referred to, after numerous accounts had been ordered it is provided as follows: "And by consent of parties the right and privilege is given to C. D. Glendy to take possession and control that part of the real estate involved in this cause which was assigned to him, subject, however, to all liens existing thereon and especially subject to the deed of trust lien in favor of Warner Wood covering all the real estate involved in this cause, it being distinctly understood that such privilege and right to take possession and control said real estate shall not impair or affect any existing lien on said real estate or the right of any holder or owner of any lien thereon to enforce the same."

At August rules, 1903, Micajah Woods and J. W. Fishburne, executors of Warner Wood, deceased, against whom this suit had been revived by consent, filed a cross-bill, in which they set out the proceedings theretofore had so far as they were pertinent to the interests of their testator. They call attention to the fact that the "Wilderness" tract of land had been originally conveyed to Hugh W. Sheffy, trustee, subject to a lien of \$3,000 in favor of Hugh W. Sheffy and James Bumgardner, Jr., trustees, holding the lien of \$3,000 on the "Wilderness" tract of land, united in the deed under which Mary J. Glendy held, and those claiming under her hold, for the purpose of showing that the aforesaid lien had been paid in full out of the sum of \$4,000 which Warner Wood loaned to Robert J. Glendy

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and Mary J. Glendy, and which the said deed was executed to secure. The cross-bill charges that the whole of the \$1,000 loan was used for the payment of the aforesaid lien and interest, and that by reason of the premises Warner Wood became and has continued to be subrogated to all the rights and remedies of the said Hugh W. Sheffy and James Bumgardner, Jr., trustees, under said lien in addition to the rights which he acquired under the deed of trust aforesaid.

The contract of September, 1890, by which C. D. Glendy and William M. McAllister, trustee, gave an option to Lewis Harman and Carter Berkeley to purchase the "Wilderness" tract, is set out, and a part of the decree of the 18th of February, 1891, is recited as follows: "And the said Charles D. Glendy consenting thereto, the said Lewis Harman and Carter Berkeley shall also pay to the said general receiver that portion of the hand payment contracted to be paid by them to the said Charles D. Glendy, it being manifest to the court that the greater part thereof will be necessary to pay off and discharge Charles D. Glendy's one-half of the trust lien, reported in this cause in the name and favor of Warner Wood."

It is assigned as error that the debt of Warner Wood was allowed as a lien against the lands of C. D. Glendy, (1) because Mrs. Glendy had only a life estate in the property; (2) because the statute of limitations barred the right to enforce the lien; and (3) because the demurrer to the cross-bill should have been sustained.

It will be observed that Mrs. Glendy was not a volunteer, but a purchaser for valuable consideration, as appears from the deed of November 20, 1876, by which the "Wilderness" estate was conveyed to Hugh W. Sheffy, in trust for the sole and separate use of Mary J. Glendy," and in the event of the death of Robert J. Glendy before the said Mary J. Glendy that said trustee will convey said real estate to the said Mary J. Glendy to hold it during her natural life with remainder in fee to such persons as she may by deed or will appoint, and in default

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thereof to her right heirs, and in case the said Mary J. Glendy shall die before her said husband, then the said trustee will convey said real property to such persons as the said Mary Jane Glendy may in writing, attested by three witnesses, or by her last will and testament, designate and appoint, and in default of such appointment to her children." The husband survived the wife, who died leaving a last will and testament, by which she devises this estate to her son, C. D. Glendy, and her daughter, Edmonia, from whom Robert J. Glendy derives title.

We are of opinion that her devisees took a fee simple estate.

We are also of opinion that the statute of limitations does not bar the right to enforce the lien.

The statute upon which appellant relies is section 2935 of the Code, which provides that, "No deed of trust or mortgage hereafter given to secure the payment of money, and no lien hereafter reserved to secure the payment of unpaid purchase money shall be enforced after twenty years from the time when the right to enforce the same shall have first accrued, and no deed of trust or mortgage given prior to May first, eighteen hundred and eighty-eight, to secure the payment of money, and no lien reserved prior to May first, eighteen hundred and eighty-eight, to secure unpaid purchase money, shall be enforced after twenty years from the time the right to enforce the same shall have first accrued; provided, the limitation of the right to enforce such deed of trust, mortgage, or lien reserved, shall not expire prior to May first, nineteen hundred and three."

The debt is set forth *in extenso* in the bill filed by McAllister, trustee, and others, and all the parties bound for its payment were before the court; and if the moiety of land belonging to C. D. Glendy could not originally in that proceeding have been sold for the satisfaction of this debt, the difficulty

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consisted in a defect in the prayer for relief. The whole transaction out of which this debt grew, all the parties to it, and the property upon which it was secured were under the jurisdiction of the court in that case.

In this attitude of affairs consent decrees were entered which fully recognized that the share of Charles Glendy in the "Wilderness" tract is bound by the lien to secure the Warner Wood debt; and by the decree of April 29, 1903, he in express terms consents that it shall be "subject to the deed of trust lien in favor of Warner Wood covering all the real estate involved in this cause." It will be observed that this decree was entered two days before May 1st, 1903, before which date by the terms of section 2935 it is declared that the limitation of the right to enforce such deed of trust, mortgage, or lien reserved, shall not expire.

We think, also, that the cross-bill was properly filed, and that its effect was to cure any omission existing in the pleadings up to that time.

"A cross bill is a bill filed by a defendant in a suit against a plaintiff, or some other defendant, or both, in the same suit touching the matter in question in the original bill; and it may be either to obtain a discovery in aid of the defense to the original bill, or to obtain relief for all parties touching the matter of that bill. . . . This bill lies, among other instances, in the following cases: . . . where a question arises between two defendants upon a case made out by evidence arising from pleadings, and proofs between the plaintiffs and defendants; . . . and where at the hearing it appears that the suit already instituted is insufficient to bring before the court all matters necessary to enable it to decide upon the rights of all the parties." 1 Barton's Chancery Prac., sec. 101.

In this case the original bill and all the proceedings show that the executors of Warner Wood, deceased, have a perfect case as against their co-defendant, C. D. Glendy. Not only do the

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facts recited and proof establish this right beyond peradventure, but C. D. Glendy has conceded it in decrees entered by his consent. It would be a travesty upon justice, under the circumstances disclosed in this record and which we have set out in detail, to turn these executors out of court and declare that their just claim is barred by the statute of limitations.

We are of opinion that the assignment of error, with respect to the debt of Warner Wood as a lien against the land of C. D. Glendy, is not well taken in any of its aspects.

We are further of opinion that there was no error in the decree with respect to the liens established for taxes, amounting to \$307.66; for one-half of the Barley and Thomas attachments, amounting respectively to \$233.33 and \$87.09; or to the amount allowed William M. McAllister, receiver, \$465.31.

We are of opinion, however, that there is error in so much of the decree as dismisses the Highland Development Company as a party to the suit. Upon this subject, the decree is based upon the proposition that the Highland Development Company claims by title adverse to any party to this cause and not through any of said parties, following the law as stated by this court in *Pillow v. Southwestern Improvement Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804, in which the court holds that a partition suit cannot be made a substitute for an action of ejectment, and that to give the court jurisdiction to settle questions of title in such a suit, the defendant must be a person who claims under one who was a joint owner with the plaintiff."

Without undertaking to discuss the effect of the amendment to the statute which has been made since the decision in *Pillow v. Southwest, &c., Co.* was rendered, it is sufficient to observe that a partition of the land between C. D. Glendy and R. J. Glendy was not the sole object of this suit, as originally instituted, and subsequent decrees and proceedings in the case have made it in effect a creditor's bill for the satisfaction of liens due by the co-parceners and binding upon the estate to be par-

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tioned; so that it is brought within the influence of that very numerous class of cases which require that before real estate can be sold for the payment of debts, all clouds upon the title must be removed and all liens, their amounts and order of priority, be fixed and determined. *Rossett v. Fisher*, 11 Gratt. 492; *Horton v. Bond*, 28 Gratt. 817; *Hudson v. Barham*, 101 Va. 67, 43 S. E. 189, 99 Am. St. Rep. 849, are some of the many authorities upon that point.

For this error we are of opinion that the decree of the Circuit Court should be reversed, and it is affirmed in all other respects.

Reversed in part.

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AILSTOCK v. THE MOORE LIME CO.

November 23, 1905.

1. **MALICIOUS PROSECUTION**—*Suing out an Attachment before a Court without Jurisdiction.*—If an attachment be sued out maliciously and without any probable cause from a court without jurisdiction, and damage results from the levy of said attachment, the defendant in the attachment may sue the plaintiff therein for the damage so occasioned. The malicious suing out and levy of the attachment is sufficient basis for the action.

Error to a judgment of the Circuit Court of Botetourt county, sustaining a demurrer to the plaintiff's declaration in an action on the case. Plaintiff assigns error.

Reversed.

Harvey & Nelson and DeWitt V. Lemon, for the plaintiff in error.

Benjamin Haden, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This is an action on the case, brought by plaintiff in error, J. T. Ailstock, to recover of the defendant in error, the Moore Lime Company, damages for malicious prosecution of a civil suit.

The declaration alleges that the Moore Lime Company "went

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and appeared before one W. R. Carper, then and there being one of the justices of the peace in and for the said county of Botetourt, and then and there before said justice falsely and maliciously, and without any probable or reasonable cause whatever, caused and procured the said justice to issue and grant it a writ of attachment against the said plaintiff and in favor of the said Moore Lime Company, as plaintiff therein, in the words and figures following, to-wit:

“Virginia:

“Botetourt county, to-wit:

“To R. L. Rudersill, deputy sheriff of said county:

“Whereas the Moore Lime Company have this day made before me, W. R. Carper, a justice of said county, a complaint on oath that they verily believe that they have a just claim against J. T. Ailstock for the sum of one hundred and thirty-six dollars and ninety-eight cents (\$136.98) for debt due them for open store account (account herewith attached) and that the said Moore Lime Company has present cause of action therefor, and furthermore to the best of affiant’s belief that the said J. T. Ailstock has or will have in the hands of W. G. Matthews estate sufficient to satisfy the claim of the said Moore Lime Company.

“These are therefore in the name of the Commonwealth to command you to attach the estate of the said J. T. Ailstock now in the hands of the said W. D. Matthews for the amount of the said claim, and make return thereof at Eagle Rock, Virginia, in the said county, on September 9, 1903, at 10 o’clock a. m., before me or such other justice of said company as may be there to try this attachment, showing the day and manner of executing the same.

“Given under my hand this 31st day of August, 1903.

“W. R. CARPER, J. P.

“And the said defendant afterwards, to-wit: on the same

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day of the date of the said writ of attachment, delivered the same to R. L. Rudersill, a deputy sheriff of said county, and then and there maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said deputy sheriff to execute the said attachment on W. G. Matthews in whose hands was a large sum of money, to-wit: \$250 owing to the said plaintiff: that by reason of the execution of this writ of attachment the said W. G. Matthews refused to pay to the said plaintiff the whole or any part of the amount owing to him: that afterwards, to-wit: on the 12th day of September, 1903, the attachment proceedings were dismissed and abandoned by the said defendant." Then follows the allegation that by the wrongful and unlawful suing out and execution of said writ of attachment the plaintiff was damaged, etc.

To this declaration the Moore Lime Company demurred, which demurrer was sustained, and to that judgment this writ of error was awarded.

The sole question involved in the demurrer, necessary to be considered here, is, *"if an attachment be sued out from a court without jurisdiction, maliciously and without any reasonable or probable cause whatsoever, and damage results from the levy of the said attachment, can the malicious suing out and levy of the said attachment be made the basis for an action for damages?"*

This precise question has never been before this court, so far as we have been able to find from the reported cases and the authorities elsewhere seem hopelessly divided; though it seems to us that the best reasoned cases maintain the proposition that the action will lie.

It is clear from the declaration that the justice who issued the attachment complained of was wholly without jurisdiction. In the first place, the amount sued for (\$136.98) was in excess of his jurisdiction, and his warrant sets out no ground upon which to issue an attachment.

By section 2961 of the Code, it is provided, that a justice

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may issue an attachment against a debtor removing his effects out of the State; and by section 2962, that he may issue an attachment against a tenant removing his effects from the leased premises. But neither of these grounds for the attachment appears in the justice's warrant in this case. It merely shows that the debt sued for was due and owing and was an open store account for \$136.98, which is in excess of a justice's jurisdiction, the limitation of the jurisdiction of a justice in such cases being \$100.00. Section 2939, Va. Code, 1904.

"It has been considered," says Chitty in his work on Pleading, vol. 1, p. 204, "that when civil proceedings, in an inferior court having no jurisdiction over the debt, are adopted by a party with an express malicious intent, though there be a demand recoverable elsewhere, an action on the case may be supported;" and, in p. 149 of the same volume, citing a number of authorities, the same author says: "If the proceeding be malicious and unfounded, though it were instituted in a court having no jurisdiction, case may be supported, or trespass."

In a note by Hare & Wallace, 1 Am. Lead. Cas., 260, it is said: "An action lies also for maliciously holding to bail, or maliciously attaching property, under the process of a court which has no jurisdiction. And it lies for maliciously suing out an attachment, and attaching the plaintiff's property, where nothing is due, or for more than is due. It lies also for maliciously suing out a domestic attachment, where either there is nothing due, or the party has not rendered himself legally liable to such process." Among the many authorities in support of the text is the case of *Goslin v. Wilcock*, 2 Wilson 302, which has been cited with approval in the cases which we will hereafter refer to, and in many others.

In *Boon v. Maul*, 3 N. J. Law 862 where it was held that suit lies for maliciously attaching property by writ from a court without jurisdiction, the opinion says: "The counsel for the defendant below, the plaintiff in this court, now insist that

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the declaration is defective, inasmuch as it does not contain an averment that the defendant knew that the Common Pleas of Philadelphia had not jurisdiction of the cause. In the case of *Goslin v. Wilcock*, 2 Wil. 302, which case very much resembles the present, in point of principle, this averment was not considered essential. It appears to me that if a man maliciously makes use of the process of law, with an intention to vex and distress another, that he does it at his peril; he must see to the legality of the proceedings."

The Supreme Court of Ohio has uniformly held to the same doctrine. See *Fortman v. Rottier, &c.*, 8 Ohio St. 548, 70 Am. Dec. 606, and *Coal Co. v. Upson*, 40 Ohio St. 17. In the last named case, the opinion says: "It may now be considered the approved doctrine that an action for the malicious prosecution of a civil suit may be maintained whenever, by virtue of any order or writ issued in the malicious suit, the defendant in that suit has been deprived of his personal liberty, or of the possession, use or enjoyment of property of value."

In *Hay v. Younglove*, 7 B. Mon. 545, it was held, that where a proceeding was malicious and unfounded, though instituted before a court having no jurisdiction, either trespass or case may be maintained.

To the same effect is *Brand v. Hinchman*, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362, where it was held—citing a number of authorities—that the action would lie, even where there had been no arrest or seizure of property.

In *Morris v. Scott*, 21 Wend. 281, 34 Am. Dec. 236, the Supreme Court of New York, held, that "An action on the case for a malicious prosecution lies against a party who falsely and maliciously prosecutes another, although the court in which such prosecution was had was utterly destitute of jurisdiction in the matter;" and that all that was necessary to maintain such an action was the malice and falsehood of the prosecution.

In *Kerr v. Mount*, 28 N. Y., 659, a case very similar to the one under consideration, the opinion by Denio, C. J., says:

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"The process being void, the party who set it in motion, and all persons aiding and assisting him, were *prima facie* trespassers. If, though void as respects the party, it were yet regular and apparently valid on its face, it might protect the officer against an action, on the principle of *Savacool v. Boughton* (5 Wend. 170); but this protection, being extended to the officer upon motives of policy, would not at all aid the party. Acts which the officer might justify would be trespasses against the party. There is no principle with which I am acquainted which can shield the defendant from the damages which the plaintiff has sustained by his wrongful act in causing this property to be seized under a void warrant of attachment."

In *Antcliff v. June*, 81 Mich. 477, 45 N. W. 1019, 10 L. R. A. 621, 21 Am. St. Rep. 533, also similar in many respects to the case we have under consideration, after showing that "latterly the American authorities are tending strongly and increasing rapidly in favor of the maintenance of a suit for malicious prosecution where no property is seized and the person is not molested," and that the exact point had not been passed on by that court before, the opinion says: "I am satisfied, however, that if the wrong and injury is done by a malicious suit, it is immaterial, upon principle, whether the court had jurisdiction or not to entertain such suit. For every malicious wrong there is certainly in this day and age a remedy; and, under our liberal system of pleading in this State, a plain and clear statement of the facts constituting the wrong is sufficient, and it is but little matter, in actions of trespass on the case, what the action is named or called." In Michigan there is a similar statute to section 2901 of our Code, which provides that an action of trespass on the case may be maintained where an action for trespass would lie.

The line of authorities from which we have made the foregoing citations maintain, that it is as much a wrong to disturb ones property or peace, or to injure his reputation and credit by the prosecution, maliciously, of a civil suit, as it is to prose-

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cute one maliciously and without probable cause, by which the person is wronged, going upon the common law principle, that for every injury there is a remedy, and to deny remedy in such case would violate this wholesome principle. They maintain that when the plaintiff sets the law in motion, he is the cause, if it be done groundlessly and maliciously, of the defendant's damage, and that while a void process of law upon which ones property is seized, or he is deprived of his liberty, might, upon motives of public policy be sufficient to protect the officer executing the process, it would not at all aid the party who began and carried on the action with malice and without probable cause.

There is unquestionably a strong array of authority for the opposite view, but, as we have remarked, the question has never been determined in this State, and we are, therefore, at liberty to adopt the view that we think is founded on the better reason, and that view is in accordance with that taken in the authorities we have cited and as expressed pointedly by Pennington, J., in *Boon v. Maul*, *supra*, viz: That if one maliciously makes use of the process of law, with an intention to vex and distress another, he does it at his peril. He must see to the legality of the proceedings. This is the *gravamen* of the charge made in the declaration in this case, and we are of opinion that the demurrer thereto should have been overruled.

The judgment of the Circuit Court will, therefore, be reversed and annulled, the demurrer overruled, and the cause remanded for a trial upon its merits.

Reversed.

Syllabus.

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METROPOLITAN LIFE INSURANCE CO. v. HALL.

November 23, 1905.

1. **EVIDENCE—Insurance Policy—Parol Evidence to Vary.**—In an action to recover on a life insurance policy, a contemporaneous parol agreement or understanding between the agent of an insurance company who solicits the insurance and the insured as to the time and place of paying the premiums, different from that stated in the policy, cannot be given in evidence, as it varies or contradicts the terms of the written contract of the parties.
2. **LIFE INSURANCE—Non-Payment of Premium—Waiver by Agent—Extension of Time—Subsequent Illness.**—An insured should look at his policy and conform to it, and limitations of the agent's authority should be effective, unless the insurance company, by a course of business or otherwise, has waived the limitation on the agent's power of waiver. An agent to collect premiums has no authority to extend the time of payment of an overdue premium, and, where the policy declares a forfeiture for failure to pay at maturity, and forbids waiver by agents, their agreements to extend time of payment do not, as a rule, bind the company. If the rules of the company allow the superintendent to accept premiums after maturity but before the date when a premium receipt must be returned for cancellation, provided he can certify that the former insured is in good health, the assured takes the risk of being in good health between the dates mentioned, and, if not, the superintendent has no authority to receive a premium then tendered.
3. **EVIDENCE—Opinion of Witness.**—A witness should not be permitted to answer questions which do not seek to elicit facts, but mere opinions upon matters upon which opinion evidence is not admissible.

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Error to a judgment of the Circuit Court of Alleghany county, in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

O. B. Harvey and *W. E. Allen*, for the plaintiff in error.

Geo. A. Revercomb and *A. C. Braxton*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is an action on a life insurance policy, which provides among other things, that if any premium or installment thereof be not paid when due the policy shall be void; that all premiums are payable at the home office, in the city of New York, but at the pleasure of the company suitable persons may be authorized to receive such premiums at other places, but only on the production of the company's receipt, signed by the president or secretary, and countersigned by the person receiving the premium; and that the contract between the parties is completely set forth in the policy and the application therefor, taken together, and none of its terms can be varied or modified, nor any forfeiture waived or premiums in arrears received, except by agreement in writing signed by either the president, vice-president, secretary or assistant secretary, whose authority for this purpose will not be delegated, and no other person has or will be given authority.

The premiums on the policy were payable quarterly, on the 16th day of April, July, October and January of each year. The second premium, which was due July 16, 1902, was not paid. On the 21st of that month, Gilmore, the agent of the insurance company, who solicited the insurance, delivered the policy and collected the first premium, went to the home of the insured,

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who was living with her mother, the beneficiary in the policy in certain contingencies, to collect the second premium. The mother informed him that she had the money with which to pay the premium, but as her rent was due that day she would prefer not paying the premium until the next day, if that would be agreeable. Gilmore assented to this arrangement, but told her that he was going to leave the town (Covington, Virginia), the next morning, to be absent for several days, and that Mr. Hill, the assistant superintendent, would call and get the premium. Gilmore testified that he reported to Hill the arrangement he had made with Mrs. Hall; that Hill made no objection to it, and agreed to collect the premium the next day. This statement Hill denied. He did not collect the premium, but on the contrary about the 25th of that month returned the official receipt, which Gilmore had when he went to collect the premium, to the superintendent of the company at Lynchburg, and the policy was cancelled on the books of the company.

On the evening of the day upon which Gilmore returned to Covington, which was the 3rd or 4th of August, Mrs. Hall sent the amount of the premium to him, and he gave his receipt as agent therefor. The next morning he took the money to the office of Mr. Hill, but the officials there declined to receive it, stating that the insured was then sick of the disease (typhoid fever), of which she died on the 6th of that month.

The company refused to pay the policy upon the ground that the insured had forfeited all her rights under it by her failure to pay the second premium as provided by the policy. The beneficiary on the other hand insisted that there had been no forfeiture, or if there had been the company had waived it, or was estopped from setting it up as a defense.

One of the grounds upon which it is claimed that there was no forfeiture is that it was understood and agreed between the insured and Gilmore, the agent, that the premiums, although made payable by the policy on the 16th of the month, were not in fact payable until after the 20th of the month; and that it

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was also understood and agreed that the premiums were payable at the house of the insured. Mrs. Hall and Gilmore, the agent, both testified that such was the agreement; but they further testified, or rather Mrs. Hall did and Gilmore's evidence is not to the contrary, that the agreement was made at the time the policy was issued.

This understanding or agreement was in conflict with the express terms of the policy, and could not be proved under the well settled rule, that contemporaneous parol evidence is not admissible to contradict or vary the terms of a written contract. *Towner v. Lucas*, 13 Gratt. 705; *Catt v. Olivier*, 98 Va. 580, 36 S. E. 980.

Richards, in his work on Insurance, sec. 77, says: "But it is very important to notice that an oral assent or promise made to the insured at or before the execution of the contract, to the effect that he may in the future violate the terms of the policy, is not binding, and cannot be shown by parol, because the oral promise becomes merged in the contract. Thus an antecedent promise by an agent that a premium note need not be paid when due cannot be shown by parol."

Another ground relied on to show that there was no forfeiture was that it was the custom of the company in Covington for its agents to go to the homes of the insured to collect the premiums and not to go until after the 20th of the month, because that was payday at the paper mill, in which many of the insured worked, and they were unable to pay until after that time, although the premiums, by the terms of the policy, were due and payable at an earlier day.

It appears that the insurance company issued at Covington two kinds of policies, one known as the "industrial," and the other as the "ordinary." By the express terms of the industrial, a different policy from the one sued on, which was the ordinary policy, the agents of the company were required to go to the homes of the insured and collect the premiums. The evidence further showed, perhaps, that as to the industrial poli-

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cies the custom of the company was not to enforce strictly the rule as to the payment of the premiums the day they became due; but the evidence wholly fails to establish any such custom as to the payment of premiums on policies like that in suit.

It thus appears that the policy had lapsed for the non-payment of the second premium when it became due and payable, and that there can be no recovery thereon unless the insurance company has waived the forfeiture, or is estopped by its conduct from setting it up as a defense.

If it be conceded that Gilmore, who had possession of the official receipt of the company and was sent by Hill, the assistant superintendent, to the home of the insured to collect the premium after the policy had lapsed, could have received the premium so as to bind the company, without evidence that the insured was in good health, it does not follow that he had authority to extend the time for its payment, and bind the company afterwards to accept the premium when tendered if the insured was sick or dead when the tender was made.

An agent employed or authorized to collect a claim does not thereby have authority to bind his principal to grant an extension of time, at least for the payment of an overdue premium. *Hutchings v. Munger*, 41 N. Y. 155; *Critchett v. American Ins. Co.*, 53 Ia. 404, 5 N. W. 543, 36 Am. Rep. 230; *Richards on Ins.*, p. 497.

"As to waivers taking place after issue of policy," says Parsons, in his editions of May on insurance, quoted by this court with approval in *Va. Fire & M. Ins. Co. v. Richmond Mica Co.*, 102, Va. at pp. 438-9, 46 S. E. at 466, 102 Am. St. Rep. 846, "it is very proper to require the assured to look at his policy and conform to it, and the limitation of the agent's authority should be effective, unless the insurance company, by a course of business or otherwise, has waived the limitation on the agent's power of waiver."

And in *Conway v. Phoenix, &c., Co.* (N. Y.), 35 N. E. 420, it was held, that where a life insurance policy provides that no

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agent "can alter, modify, or waive, any of the terms or conditions of this policy," and any subsequent premium be not paid when due and a separate receipt signed by the president or secretary of the company in each case given therefor, then the policy shall cease, the general agents of the company, without its consent, cannot extend the time for paying premiums. It was further held in that case that where such agents, under a custom in their office, of which the company has knowledge, are at liberty, not to make any new agreement as to time for payment of premiums, but to accept payment after they are due and thus waive the right to declare a forfeiture, provided that at that time the conditions have not been changed by an alteration in the health of the insured, and they extend the time of payment of a premium by the insured, the risk is on him that pending the delay granted by the agents he may change in health or die and his insurance be lost; and in case of his death before payment the policy is forfeited.

By the terms of the policy sued on, the general agents had no authority to make any agreement for the extension of time for the payment of a premium, but under a rule of the company it was provided that, "Between the date on which a premium falls due and the date when a premium receipt must be returned for cancellation, overdue premiums may be accepted by the superintendent provided he can certify that the former insured is in good health."

If Hill, the assistant superintendent, had gone to the home of the insured on the 22nd day of July, as Gilmore testified he had agreed to do, and had found that the insured was sick, as she was on that day, so that he could not make the certificate of good health required by the rule, he would have had no authority to receive the premium, under the principles enunciated in *Conway v. Phoenix, &c., Co., supra*, which we think are correct. The insured had not lived up to her contract, and if she wished further time for paying the premium than is permitted by her policy, the risk incident to such delay ought

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to be hers and not the insurance company's. While the contract was in force, as is said in the case last cited, and up to the time when the insured had the right to renew it by payment of the premium in advance, the risk in the matter was on the company; but upon failure to pay, after notice, upon the due date of the premium the risk was on the insured, that pending the delay permitted by the agents she might change in health, if not die, and her insurance be forfeited.

From what has been said it follows, that, in our opinion, the trial court erred in permitting the plaintiff to introduce evidence to establish a contemporaneous parol agreement or understanding as to the time and place of paying the premiums different from that stated in the policy of insurance; and also erred in giving Instruction No. 1, asked for by the plaintiff and objected to by the defendant.

The action of the court in overruling the plaintiff in error's objection to the following questions and answers is assigned as error, viz:

"Mr. Gilmore, if you had told Miss Hall that the policy would not be good if you did that" (referring to the agreement for an extension of time), "wouldn't she have paid you that day, or would she?"

Ans. "Yes, sir, I suppose she would."

"Now was it not the duty of the agent of this company to have gone to Miss Hall or Mrs. Hall in order to collect this premium after you had extended the time after the 21st of July?"

Ans. "I suppose it was; she was under the impression that the agent would come and collect it, and they had always done so."

The plaintiff insists that the bills of exceptions as to the rulings of the court in question are not sufficient to enable this court to pass upon them.

Without passing upon the sufficiency of the bills of exception, as the case will have to go back for a new trial upon other

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grounds, and these questions may again be asked, it is proper to say, that if objected to by the defendant on the new trial the objection should be sustained, as the witness is not asked to state facts but to give his opinion upon matters upon which opinion evidence is not admissible.

The judgment of the Circuit Court must be reversed, the verdict set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

Reversed.

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**ONEY AND OTHERS v. WEST BUENA VISTA LAND CO.
AND OTHERS.**

November 23, 1905.

1. **EASEMENTS—Sale of Lots—Recorded Plat—Bridge-Repairs.**—Where a plat of lots showing streets, alleys, etc., and a bridge over a river, connecting the lots with an adjacent city or town, has been duly recorded as provided by the "Plat Act", and lots have been sold with reference to the plat, and purchasers have relied upon the use of the bridge as one of the main inducements to purchase, and the bridge has been constructed and thrown open to the use of the public, and has been used by it, the law implies a grant of the bridge as an easement to the property conveyed. The grantor or dedicatrix of an easement, however, is generally under no obligation to make repairs. This duty rests on those who use the easement, and, if they fail to discharge it, they must suffer the inconvenience. This rule is changed only where there is a special agreement or prescriptive right to the contrary.
2. **EASEMENTS—Bridge—Repairs—Abandonment.**— The failure of lot owners who are entitled to the use of a bridge as an easement to their lots to keep the bridge in repair for an unreasonable length of time will amount to an abandonment of the easement, and will entitle the grantor of the easement to make such use of the materials as he sees fit. But where the bridge is still in use for some purposes, though greatly out of repair, the easement cannot be said to have been wholly abandoned, and before it is declared abandoned the users should be given a reasonable time within which to restore it to such condition as will render it safe and useful for the purpose for which it was constructed.

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Appeal from a decree in chancery of the Circuit Court of Rockbridge county. Decree for defendants. Complainants appeal.

Reversed.

The opinion states the case.

Hugh A. White, for the appellants.

E. M. Pendleton and *D. E. Moore*, for the appellees.

CARDWELL, J., delivered the opinion of the court.

During what is now commonly spoken of as the "boom" period, the West Buena Vista Land Company, the owner of a tract of several hundred acres of land lying just across North river, from, and west of, Buena Vista, a town then rapidly growing in population, and which afterwards became a city, desiring to enhance the value of its property and make sale of its land in town lots for building purposes, etc., laid the same off into lots, blocks, streets, alleys, parks and other public places, and on the 23rd day of September, 1890, placed a map or plat of said land, so divided, upon record in the clerk's office of the County Court of Rockbridge county, according to law. The idea of the West Buena Vista Land Co. seems to have been to make its lands across the river from Buena Vista practically a part of that town, and to that end determined to build a bridge across the river connecting the prospective town of West Buena Vista with Buena Vista, and this bridge across North River was shown on the map or plat, made and recorded as stated. The streets of West Buena Vista were to be connected continuously with the streets of Buena Vista by this bridge, and Lexington and Moore streets, appearing on the map of West Buena Vista, and which converge together at the west end of the bridge, form with the bridge a continuation of 20th street in Buena Vista at the east end of the bridge.

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After recording the map showing the streets and bridge, the West Buena Vista Land Company, proceeded to make sale of its lots, villa sites, etc., and, among other sales, it sold to J. L. Oney and his associates a mill, residence and out-buildings, shown on said map, and known as "Moore's Mill," on March 20, 1891, at the price of \$6,000.00, a "boom" price according to the evidence in this record, and about twice as much as the property would have brought but for the map of West Buena Vista showing the bridge across North River.

This bridge, contemplated and contracted for in 1890, was well under way in construction when Oney and his associates bought the mill property, which was connected by open and convenient streets and alleys with the bridge, and within a few yards of its west end, and was subsequently completed, extending not only across the river, but also over the railroad tracks of the Furnace Company, the Chesapeake and Ohio, and the Norfolk and Western Railway Companies, and terminated in Sycamore (20th) Street in Buena Vista, with the consent of these several companies, but the completion of the bridge was in accordance with the representations of the company in effecting sales of its lands.

By the bridge, "Moore's Mill" was brought within one-half mile of the business centre of Buena Vista, while without it the distance was about two miles around by the county road and bridge below. It is admitted that this bridge was built as a pass-way "for the owners of the West Buena Vista Co.," and, after its completion, the public was permitted to use it, and it was used for both horse and foot passengers by those desiring to use it; and for a long time, while the county bridge below was down, it was the only thoroughfare into Buena Vista from the western portion of the county; but there has never been any other acceptance of it as a highway by the county of Rockbridge or the city of Buena Vista.

After many years of service to the public, but especially to the persons who had bought land of the West Buena Vista

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Company, and the owners of "Moore's Mill" in particular, the bridge became in need of repairs and unsafe, the flooring thereon having decayed, and by reason of a complaint from the railroad companies the flooring over the railroads was removed so as to avoid any danger to their traffic. This being the condition of the bridge, in order to continue it as a footway, the owners of "Moore's Mill" and others took up a subscription among the public and raised a fund with which a stairway was built from the ground up to the floor of the bridge at the point from which the flooring had been removed back to the end of the bridge over the railroad tracks, whereby the bridge was made a passage-way for pedestrians over North river, and has been used as such since. In May, 1904, while the bridge was being used in the way just stated, particularly by the residents on the West Buena Vista side of the river, the West Buena Vista Company, having disposed of all of its other property, made sale of this bridge with the view of dividing the proceeds of sale among the stockholders of the company, and the purchaser thereof began to tear it down; whereupon J. L. Oney and Ella B. Agner, who had become the sole owners of "Moore's Mill," filed their bill in this cause and obtained a temporary injunction restraining the West Buena Vista Company and all others from removing the said bridge, or interfering with its use by the public.

In their bill the complainants set out the origin of the bridge, its use, etc., as hereinbefore stated, and charge that they and others similarly situated bought their property in West Buena Vista in good faith on the existence of the bridge as a most valuable easement to their property; that the removal of it would inflict a serious and irreparable injury to the complainants by reason of the fact that they would then be without access to Buena Vista save around by the old county bridge, a distance of two miles; that the West Buena Vista Company is insolvent; and that complainants desire to repair and keep in repair the said bridge as an indispensable and valuable easement to their property, etc.

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By its answer the West Buena Vista Company admits that the map or plat exhibited with the bill was made and recorded in accordance with what is known as the "Plat Act" (Acts, 1887-8, pp. 553-4); that the bridge was used by every one who desired to use it, and that it was offered to the county and city as a public bridge; does not deny that complainants bought with reference to the bridge and would not have paid more than one-half as much for their property without the bridge or bought it at all. While the answer denies that the company sold with reference to the map, the deeds it made to Oney and his associates for "Moore's Mill" show that it was referred to, and the proof is uncontradicted that the bridge was urged as the inducement to the purchases of the company's property.

Upon the hearing of the cause on the bill and answer and the proofs submitted on behalf of the respective parties, the Circuit Court dissolved the temporary injunction theretofore awarded the complainants, and dismissed their bill; whereupon they obtained this appeal.

While there was, unmistakably, an offer of appellee to dedicate the bridge in question to both the county of Rockbridge and the city of Buena Vista as a part of a public highway, it is not claimed—at least it is not shown—that it was in any manner accepted by either; but it is equally as certain from the facts proved that it was not only the purpose of appellee to dedicate the bridge to the public use, and that the bridge was urged as an inducement to appellants and others to purchase the company's lands, and that it was one of the most important if not the principal inducement to them to buy. It is true that neither the bridge nor any part of it was conveyed in the deed to appellants or to any other purchasers of the company's lands, but the map showing the bridge was not only recorded as provided in the "Plat Act," *supra*, but was referred to in the deeds made to appellants and others; therefore, the law implies a grant of the bridge as an easement to the property conveyed. But the rule is that the grantor or dedicator of an

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easement is generally under no obligation to make repairs, and that this duty rests upon those who use the easement, and if they fail to keep it in proper condition for the uses for which it was granted or dedicated, they must suffer the resulting inconveniences. This rule is changed only where there is a special agreement or prescriptive right to the contrary. 14 Cyc. 1209; 2 Min. Insts. 19; 2 Tucker's Com. 7; 9 Am. & Eng. Ency. L. (2nd Ed.) 80.

There is nothing in this record to take the case out of the control of the general rule, so that while appellants and others similarly situated acquired by their purchase of lands from appellees a right in this bridge as an easement incident to their property, the burden rests upon them to keep it in proper condition for the uses for which it was constructed; and a failure to do this for an unreasonable length of time would amount to an abandonment of the easement, as an abandonment will be presumed where the owner of the right does, or permits to be done, any act inconsistent with the future enjoyment of the right. 10 A. & E. Ency. L., 435; *Buntin v. Danville*, 93 Va. 205; 24 S. E. 830; *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444; *Scott v. Moore*, 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 749. Non-user of an easement, however, unaccompanied by proof of an intention to abandon it, is not sufficient; the evidence must be clear that there was the intention to abandon. See the authorities just cited.

While the evidence shows that the bridge, since the flooring was taken up over the railroad tracks, is absolutely useless except for foot passengers, it also shows that the structure, built mainly of iron and steel, is, with the exception of the flooring well preserved, and the materials therein perfectly sound. Therefore, it cannot be said that it has become entirely useless, as appellee contends, as an easement to the property of appellants. Nor can it be said, under the circumstances, that it has been abandoned by the appellants. On the contrary appellants have been all along and are now using the bridge

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and insist upon their right to repair and restore it to a condition that will render it safe and useful for the purposes for which it was built and used for many years after its construction. It would, we think, be manifestly unjust to permit appellee, after having used this bridge as an inducement to appellants and others to buy its property, and permitted its use as stated, to remove it and thereby deprive these purchasers of a valuable and indispensable easement to their property.

But we are further of opinion that to entitle appellants to a continuing right or interest in this bridge as an easement they should be required to restore it, within a reasonable time, to such condition as will render it safe and useful for the purposes for which it was constructed, and that if this is not done they should be regarded as having abandoned the easement, in which event appellee will be entitled to make such disposition of the materials in the structure as it may see fit. 13 Cyc., 490; *Bolling v. Petersburg*, 3 Rand. 563; *Harrison v. Parker*, 6 East. 563.

Therefore, the decree appealed from will be reversed, the temporary injunction awarded in the cause reinstated, and the cause remanded to the Circuit Court with directions to put appellants upon the terms that unless they repair, or cause to be repaired, the said bridge, putting it in a good and safe condition for the uses for which it was constructed and formerly used, within a reasonable time to be fixed by the said court in its decree, the injunction will stand dissolved and their bill dismissed.

Reversed.

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TURK AND OTHERS V. RITCHIE AND OTHERS.

November 23, 1905.

1. **EQUITY—Order of Reference—Partial Execution—Proof of Other Debts.**—Until a decree of reference for an account of debts against the estate of a decedent has been fully executed it is entirely proper for a master before whom the reference is pending to report additional debts against the estate.
2. **EQUITY—Final Decree—Proof of Debts.**—In a suit brought by executors to administer the estate of their testator, where there has been a report of a master making a tentative statement on the assets, the unpaid debts so far as ascertained, and estimated balance of assets for distribution among the legatees, a decree which, without confirming the report, directs the payment of certain specified debts and recommitts the cause to the master "to take a further account of the transactions of the executors, and, if possible, to make an accurate distribution between the residuary legatees" is not a final decree, and other creditors of the testator may thereafter come in and assert their debts.
3. **EQUITY—Enforcement of Lien—Personal Decree for Balance—Decree against Surety—Limitation of Actions.**—Upon a bill filed by a creditor against principal and sureties in a bond, setting out the execution of the bond and praying its enforcement especially against real estate conveyed in trust by the principal for that purpose, and concluding with the usual prayer for general relief, it is entirely competent for the court to render a decree against the principal and sureties, or their personal representatives, if they are dead, for the balance due on the debt after allowing credit for net amount arising from the sale of the land. Equity having acquired jurisdiction for one purpose will grant complete relief. Moreover, the decree settles all questions as to the validity of the debt, and that it is not barred by limitation.

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4. **LIMITATION OF ACTIONS.—Death of Debtor before Cause of Action Accrues—Judgment against Executor—Enforcement of Judgment—Code, section 2920.**—The provision of section 2920 of the Code, declaring that a right of action which accrues to a creditor after the death of a debtor, shall not continue longer than five years after the same shall have accrued, does not bar the claim of a creditor who obtains judgment in 1895 against the executor of a debtor upon a bond upon which the right of action accrued in January, 1894, after the debtor's death, and who proves the judgment in 1899, in a suit brought to settle the debtor's estate.
5. **EQUITY—Laches.**—The personal representative of a surety cannot complain of laches on the part of the creditor, where the time has been spent in the prosecution of the debt against the estates of the of the principal, and of a co-surety for the relief of such surety.

Appeal from a decree in chancery of the Circuit Court of Augusta county in the suit of *Turk's Executors v. Turk's Creditors*, in which certain creditors asserted their claims. Decree in favor of creditors. R. S. Turk, surviving executor, and in his own right, and as administrator of William A. Turk, appeals.

Affirmed.

The opinion states the case.

Braxton & McCoy, for the appellant.

Bumgardner & Bumgardner, Jos. A. Glasgow, H. G. Eichelberger and Charles Curry, for the appellees.

CARDWELL, J., delivered the opinion of the court.

In 1890, Rudolph Turk died testate, appointing W. A. and R. S. Turk his executors. By his will, he directed that all his just debts and funeral expenses be paid as soon after his death as practicable, and, after making two specific bequests, and directing how the residue of his estate was to be divided among his two sons then living and the widow and daughter of a deceased son, empowered his said executors to sell all of his

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real and personal estate, or so much thereof as they might deem best in order to carry out the terms of his will, conferring upon them full power to make conveyances of any and all real estate which they might sell, etc.

In September, 1891, W. A. Turk and R. S. Turk, in their own right and as executors, as aforesaid, instituted this suit of "*Turk's Ex'ors v. Turk's Creditors*," the scope and object of which was to convene all the creditors, known and unknown, of the said testator and to settle and distribute his estate under the direction of the court.

At the time of Rudolph Turk's death the appellee, Mary E. Ritchie, nee Shifflett, a daughter of Givens Shifflett, now also deceased, held a bond dated November 20, 1860, for the penal sum of \$5,183.60, conditioned for the payment to David Fultz, her trustee, one day after the death of said Givens Shifflett, the sum of \$2,591.80, in which Givens Shifflett was principal and the said Rudolph Turk and one D. Bashaw were sureties, which bond was secured by a deed of trust executed by Givens Shifflett to David Fultz, trustee, on a certain parcel of land owned by Shifflett, situated in Augusta county. Givens Shifflett died on January 14, 1894, whereby the said bond became due and payable on the following day, January 15, 1894; and in May, 1894, Mary E. Ritchie filed her bill in equity in the Circuit Court of Augusta county, in which her husband united for conformity, under the short style of *Ritchie and wife v. Shifflett's Admr., et als*, to enforce payment of said bond, and to that end to have the deed of trust securing the same enforced. The parties made defendant to this bill were the administrator, widow and heirs at law of Givens Shifflett, deceased, R. S. Turk and W. A. Turk, the executors of Rudolph Turk, deceased, Darwin Bashaw, and the executor of David Fultz, deceased, who was trustee for Mary E. Ritchie, and as such held the naked legal title to the land conveyed in the deed of trust.

That cause was referred to a master commissioner, who filed his report, to which there was no exception, showing that Givens

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Shifflett had no personal assets, and that the land (123 acres) covered by the deed of trust securing the bond of Mary E. Ritchie was all of his estate, and that the sum due her was \$2,591.80, with interest from January 15, 1894. This report of the master was duly confirmed and commissioners appointed by decree of May 20, 1895, to sell the land; and these commissioners subsequently reported a sale of the land to R. S. and W. A. Turk for the sum of \$530.00, which was confirmed. The net proceeds of sale, after payment of costs, was \$405.30, which being credited on the debt of Mary E. Ritchie left due thereon, as of the day of sale, the sum of \$2,472.42, to be paid by the sureties, the estate of the principal debtor having been exhausted; and by a final decree entered in the cause December 10, 1895, after setting forth the proceedings aforesaid and ascertaining that the sum of \$2,472.42, was still due to Mary E. Ritchie, it was adjudged, ordered, and decreed that, "N. C. Watts, sheriff of Augusta county, and as such administrator of Givens Shifflett, deceased, out of assets in his hands for administration, W. A. Turk and R. S. Turk, executors of R. Turk, deceased, *de bonis testatoris*, and Darwin Bashaw, *de bonis propriis*, pay to the plaintiff, Mary E. Ritchie, the sum of two thousand four hundred and seventy-two dollars and forty-two cents, with interest thereon from the 16th day of November, 1895, till payment." In the chancery causes heard together of *Brown v. Bashaw*, *Ritchie and wife v. Bashaw*, and *Bashaw v. Bashaw*, the estate of Darwin Bashaw, the co-surety with Rudolph Turk on Mary E. Ritchie's bond, was administered, his real estate sold, and the proceeds in part applied to the payment of this debt. The sum realized from Bashaw's estate was \$1,217.29, which left, as the liability against Rudolph Turk's estate, the sum of \$2,302.22, with interest on \$2,279.43 from November 1, 1902.

During all this time the suit of "*Turk's Ex'ors v. Turk's Creditors*," was pending and undetermined, in which there had been several decrees of reference to a master commissioner to ascertain and report the debts outstanding against the estate of

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Rudolph Turk, deceased, and of the assets of the estate, none of which had been fully executed, though there was a report of the master filed January 4, 1895, making a tentative statement of the assets, the unpaid debts outstanding, as far as ascertained, and an estimated balance of assets for distribution among Turk's residuary legatees, of which R. S. Turk and W. A. Turk were each entitled to one-third. This report was acted on in a decree entered May 16, 1895, in which the court, *without confirming the report*, adopted certain specific portions of it, directed payment of certain specified debts, and a partial distribution of the assets of Turk's estate among his residuary legatees, requiring refunding bonds to be given, and recommitted the cause to a master, "to take a further account of the transactions of the executors, and, if possible, to make an accurate distribution between the residuary legatees;" but upon subsequent developments so much of the said decree as invested R. S. and W. A. Turk with title to certain lands of the estate they had purchased was set aside and annulled, and they were directed to pay on account of their purchase money bonds for said lands a sum sufficient to make up the deficiency in assets necessary to discharge the unpaid debts of the estate. No report was made on this last mentioned decree of reference till December 15, 1900, and in the mean time a decree was entered—December 9, 1895—requiring a commissioner to whom the cause already stood committed, to report particularly as to the liability asserted against the estate by one P. D. Byerley. Commissioner Waddell having failed to execute the references called for in the decree theretofore entered, a decree was entered December 13, 1898, referring the cause to Commissioner Nelson to take the accounts required by those decrees, and on July 15, 1899, while the cause was before Commissioner Nelson under the unexecuted orders of reference, Mary E. Ritchie came into it by petition, setting up her debt against the estate of Rudolph Turk, deceased, by

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virtue of the Shifflett bond and the decree in the case of *Ritchie and wife v. Shifflett et als*, to which demand Turk's executors interposed the plea of the statute of limitations, and the plea of laches.

On November 24, 1899, a decree was entered bringing the cause on for hearing on said petition and directing Commissioner Nelson, to whom the cause then stood referred, to report on the matters set up in said petition in addition to the matters called for in the previous decree, and in response to that decree Commissioner Nelson filed his report December 15, 1900.

From this report it appeared, *inter alia*, that R. S. and W. A. Turk (who had procured their bonds to the estate for \$11,074.64 to be cancelled), were indebted to the estate in their executorial capacity in the sum of \$1,142.30, as of December 13, 1900; that the distribution account, as stated by Commissioner Waddell, should be reduced to meet additional indebtedness; and that there were outstanding against the estate debts due to P. D. Byerley, Mary E. Ritchie and Jas. O. Hobbs, stating the amount of each; the debt reported as due to Mary E. Ritchie being subject to credit for such amount as might be realized from D. Bashaw's real estate. By an *addendum* to this report, filed November 12, 1902, Mary E. Ritchie's debt is restated, allowing credit for the sums realized on the debt from Bashaw's estate, and ascertaining the balance of the debt to be paid from the estate of Turk.

Upon the hearing of the cause on said report and the exceptions of Turk's executors thereto, the court by its decree of June 26, 1903, overruled the exceptions, confirmed the report and adjudged that the estate of Rudolph Turk was indebted to P. D. Byerley in the sum of \$196.54, with interest on \$144.52, part thereof, from December 15, 1900; to Mary E. Ritchie in the sum of \$2,302.22, with interest on \$2,279.34, part thereof, from the 1st day of November, 1902; and to J. O. Hobbs in the sum of \$182.40, with interest on \$100.00, part thereof, from the 13th day of December, 1900; that said debts consti-

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tuted valid subsisting debts against the estate of Rudolph Turk, deceased, properly assessed in the cause, and in no wise barred by the statute of limitations or the laches of the parties; and that said debts constituted all the unpaid indebtedness of said estate, except the costs of the suit; and decreed that R. S. Turk and W. A. Turk, executors of Rudolph Turk, deceased, pay, *de bonis testatoris* to the several parties stated the several respective sums, etc.

From this decree R. S. Turk, in his own right and as surviving executor of R. Turk, deceased, and administrator of W. A. Turk, deceased, obtained an appeal to this court.

No grounds for reversing the decree with reference to the debt of P. D. Byerley, contracted by the executors of Rudolph Turk, deceased, in preserving the property of the estate, is assigned in the petition for this appeal nor pointed out in the argument here, and therefore we are not called upon to consider the decree in that aspect.

With reference to the debt decreed to J. O. Hobbs, we deem it only necessary to say, that until the report of Commissioner Nelson, filed December 15, 1900, reporting *inter alia* the debt due to Hobbs, the decrees of reference theretofore entered directing inquiry and report of the debts outstanding against Rudolph Turk's estate were never fully executed, and the data arrived at whereby an accurate account could be made for the final distribution of the assets of the estate; therefore it was until then entirely proper for Commissioner Nelson to report any outstanding valid debt against the estate, and for the court to decree its payment.

The attack upon so much of the decree appealed from as settled the right of appellee, Mary E. Ritchie, to recover of Turk's estate the balance due her on the Shifflett bond, is made substantially upon three grounds: (1) That the decree of May 16, 1895, in *Turk's Executors v. Turk's Creditors*, was a final decree, and a creditor of the estate was thereby precluded from coming into the cause and asserting a demand against the estate;

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(2) that the decree rendered against Turk's executors, in the suit of *Ritchie and wife v. Shifflett, &c.*, relied on by appellee in her petition in this suit, is absolutely void; and (3) even if said decree were valid, it could not be relied on in this cause to repel the plea of the statute of limitations interposed by Turk's executors herein.

There is not, as we view it, an element of finality in the decree of May 16, 1895. The report of the master acted on in the decree did not purport to be a final finding as to the debts outstanding against Turk's estate, but only a partial statement of the accounts and matters necessary to a winding up of the estate. Nor does the decree confirm the report except as to certain specific findings, and recommits the cause to the master to take a further account of the transactions of the executors, and, "if possible to make an accurate distribution between the residuary legatees," thus leaving the assets of the estate still under the control of the court, liable for the payment of any valid debts against the estate which might be reported under the unexecuted decrees of reference made in the cause, and which were not fully executed, as we have remarked, until the report of Commissioner Nelson filed December 15, 1900.

The contention of the learned counsel for appellant touching the validity of the decree in favor of appellee and against the executors of Turk, entered in the suit of *Ritchie and wife v. Shifflett, &c.*, and asserted in this cause, is, not that the court entering the decree did not have jurisdiction of the subject matter of the litigation in that cause and of the parties interested therein, but that the court transcended its jurisdiction in decreeing, upon the pleadings, in favor of appellee against the executors of Turk for the balance ascertained to be due her on the Shifflett bond. In other words, that the bill filed by appellee in that cause contained no intimation of the assertion of any claim against Turk's estate, and therefore the court was without jurisdiction to enter the decree in question.

The bill, upon which the decree was made, fully sets forth

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the facts as to the execution of the bond by Givens Shifflett with Rudolph Turk and D. Bashaw as his sureties; the execution of the deed of trust to Fultz, trustee, to secure the same; the death of Givens Shifflett, Turk, and Fultz; and charges, that "your orator and oratrix are entitled to have the sum due to your oratrix, as secured as aforesaid, collected and paid over to your oratrix, and to convene before a court of equity the personal representative and the heirs at law and distributees of Givens Shifflett, deceased, and the personal representatives of David Fultz, deceased, and the personal representatives of Rudolph Turk, deceased, in order that the conditions of the bond of Givens Shifflett and Rudolph Turk and Dr. Bashaw, his sureties, executed as aforesaid to David Fultz . . . may be enforced." The executors of Rudolph Turk, deceased, as well as the other parties suggested in the charge of the bill, were made parties defendant thereto, the prayer of the bill being that the personal estate of Givens Shifflett, deceased, might be applied in due course of administration to the payment of said debt, and that in the event that said personal estate proved insufficient, which it was alleged would be the case, the tract of land upon which the debt asserted was secured be sold and the proceeds of sale applied to the payment of the debt, and concluded with the usual prayer for general relief.

Plainly the bill charged a liability upon the sureties of Givens Shifflett, as well as upon his estate, which the plaintiff would have enforced if the estate of the principal and the land specifically bound for the debt proved insufficient, whereby the sureties or their personal representatives were put on notice of the liability asserted against them. Therefore, the granting of the decree over against the executors of Turk for the balance ascertained to be due to appellee on the claim asserted, after exhausting the estate of the principal debtor, was not inconsistent with either the case made in the bill or the prayer for special relief, and was entirely proper under the prayer for general relief. 1 Bar. Chy. Prac. (2nd Ed.), 281-2; *Walters v.*

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Bank, 76 Va. 121; *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 572; *Fayette L. Co. v. L. & N. R. R. Co.*, 93 Va. 274, 24 S. E. 1016; *Laurel Creek, &c., Co. v. Browning*, 99 Va. 528, 39 S. E. 156; *Jones v. Tunis*, 99 Va. 220, 37 S. E. 841; *Vaught v. Meador*, 99 Va. 569, 39 S. E. 225, 86 Am. St. Rep. 908; *Dun v. Stowers*, *ante*, p. 290; 51 S. E. 366.

In *Beverly v. Rhodes*, *supra*, the bill was filed against the personal representatives of the principal and sureties in the bond sued on, and merely set out the execution of the bond, its assignment to the plaintiff, the qualification of the personal representatives of the deceased obligors; that they left estates, real and personal, out of which the plaintiff's debt should have been paid, and the personal representatives of the deceased obligors were made parties defendant, the special prayer of the bill being that the payment of the debt demanded be enforced, and to this end that all proper accounts might be taken, and concluded with the usual prayer for general relief. Upon a final hearing of the cause the decree was against the defendants for the amount of the debt, to be paid *de bonis testatoris*, and against Jas. B. Beverly, personally, who was the executor of William Beverly, one of the deceased sureties who had left ample estate to pay his debt, and whose estate had been fully administered in another suit to which the plaintiff in *Beverly v. Rhodes*, was not a party. From this decree Jas. B. Beverly appealed, and insisted that the Circuit Court erred in not dismissing the bill on demurrer, because the plaintiff had an adequate remedy at law and no pretext for coming into a court of equity; and further that the plaintiff's action was nothing but an ordinary action upon a plain bond, and her bill nothing but a declaration, wherefore, even if the court was of opinion that it had jurisdiction of the case made, it ought to have submitted the questions of payment, laches, etc., to a jury. But this court held otherwise, and affirmed the decree of the Circuit Court, upon the principle applied in the authorities just cited, and which are in

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accordance with the opinion in the very early case of *Parker v. Dee*, 2 Chy. Cas. 200, where it was said: "When this court can determine the matter, it shall not be a hand-maid to other courts, nor beget a suit to be ended elsewhere."

The decree asserted by appellee in this cause, being a valid decree, settled all questions as to the validity of the debt claimed by her, and that the debt was not barred by the statute of limitations when the decree was made. *Brewis v. Lawson*, 76 Va. 36, and authorities cited; *Smith v. Moore*, 102 Va. 260, 46 S. E. 326. In fact it is not contended that the debt was barred when the decree in question was entered, but that as appellee did not assert her right to recover of the estate of Turk on the bond of Givens Shifflett until July 15, 1899, five years and six months after January 15, 1894, when her cause of action thereon accrued, her demand is barred by the statute (sec. 2920 of the Code of 1887), which is as follows:

"Limitations of personal actions generally.—Every action to recover money which is founded upon an award, or on any contract, other than a judgment or recognizance, shall be brought within the following number of years after the right to bring the same shall have accrued . . . ; provided, that the right of action against the estate of any person hereafter dying, on any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than five years from the qualification of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have accrued."

The decree for this liability on Turk's estate, rendered on the 10th day of December, 1895, is asserted in this cause on the 15th day of July, 1899, three years and a half afterwards, while the cause was not only still pending and undetermined

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but the debts outstanding against Turk's estate not fully ascertained, and the estate not distributed; so that by no possible construction to be given section 2920, *supra*, can it have any application to the case under consideration.

It will be observed that appellee is not asserting in this cause a demand on the original cause of action—the Shifflett bond which became payable January 15, 1894—but the decree of December 10, 1895, into which the right of action on the original demand was merged, and, as we have said, that decree is conclusive of the question whether or not the debt was barred by the statute as against Turk's estate; therefore, the plea of the statute, interposed by Turk's executors, was rightly overruled.

There is no ground whatever for complaint on the part of Turk's executors, or residuary legatees, that appellee first prosecuted her suit of *Ritchie and wife v. Shifflett, &c.*, the result of which was to exhaust the assets of Shifflett estate, to secure a large contribution from the estate of Bashaw, the other surety of Shifflett, and thereby to reduce the liability of Turk's estate for appellee's demand to the minimum; wherefore appellant's defense of laches is wholly unavailing.

In the able arguments of counsel, other questions were raised and elaborately discussed, but in the view taken by the court of the case it becomes unnecessary to consider them.

The decree of the Circuit Court is affirmed.

Affirmed.

Syllabus.

Richmond.

TERRY AND OTHERS V. McCLUNG AND ANOTHER.

November 23, 1905.

1. **STATUTES—Repeal—Effect on Pending Causes.**—Upon the repeal of a statute conferring upon a court jurisdiction of certain causes, without any saving clause as to pending causes of that class, such causes lapse.
2. **ROAD—What Constitutes—Statutory Road—Width—Discretion—Bridleway.**—The word "road" in its generic sense means all kinds of ways, but in its statutory sense in this State it signifies a turnpike, State road, or county road, suitable in width and grade for the convenient passage of vehicles. Formerly the standard width was thirty feet, and the present statute, leaving the width discretionary with the board of supervisors, has never been construed as warranting the establishment of a way of inferior dignity to a "road". There is an implied limitation that the character of the way as a "road" shall be maintained. In the absence of special statutory authority a bridleway "for horse back travel" cannot be established.
3. **PUBLIC ROADS—Dedication—Use—Acceptance—License.**—The mere use of a road for any length of time will not make it a public road. A mere permission to the public, by the owner of land, to pass over a road upon it is, without more, to be regarded as a license revocable at the pleasure of the landowner. A road dedicated to the public must be accepted by proper authority upon its records before it can be a public road.
4. **PRIVATE EASEMENT—Prescription—What Constitutes.**—To constitute a private easement, the use and enjoyment of what is claimed must have been adverse, under a claim of right, exclusive, uninterrupted, and with the knowledge and acquiescence of the owner of the estate in, over, or out of which the easement prescribed for is claimed.
5. **ESTOPPEL BY CONDUCT.**—Conduct will not operate as an estoppel as against one who has not been induced thereby to alter his position to his prejudice.

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Appeal from a decree in chancery of the Circuit Court of Highland county, perpetuating an injunction granted to complainants. Defendants appeal.

Reversed.

The opinion states the case.

Braxton & McCoy and C. P. Jones & Son, for the appellants.

Bumgardner & Bumgardner, for the appellees.

WHITTLE, J., delivered the opinion of the court.

This appeal is from a decree perpetuating a preliminary injunction upon a bill filed by the appellees to enjoin the appellants from obstructing an alleged public road in Highland county, leading from Big Valley across Jack mountain to Bullpasture Valley. The appellee, McClung, who is the moving spirit in the litigation, owns two farms located nearly opposite to each other in these valleys, upon one of which he resides, while the other is used chiefly for grazing purposes. There is no road crossing Jack mountain between the Staunton and Parkersburg pike on the north and Muddy run pass on the south, a distance of more than twenty miles; but between those thoroughfares the mountain is traversed by three bridle-ways, or drift-ways, which, by tacit permission of the proprietors of the lands over which they pass have been used by the people of the neighborhood and others for many years as passways, and, occasionally, for driving cattle and sheep across the mountain from one valley to the other.

This was the condition of affairs in the year 1883, when proceedings were instituted in the County Court to establish a public road along one of these ways between the points indicated. The proceedings cover the period from August, 1883, to November, 1886, and are evidenced by eight orders of the County Court. They were to the last degree irregular, and failed to comply with the requirements of the statute in many

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essential particulars. But since we are of opinion that none of the orders of the County Court establishes a "road," within the meaning of the statute, it is unnecessary to notice in detail mere irregularities of procedure.

The County Court undertook to deal with the route in sections, and the only order which can be fairly said to establish any part of it directs the opening of the two middle divisions "for horseback travel, in such manner as to preserve the location." But there has never been a final order, establishing the road as applied for, from which an appeal would lie (*R. F. & P. R. Co. v. Johnston*, 99 Va. 282, 38 S. E. 195), and while the matter was *in fieri* and undetermined the act of February 3, 1888, was passed, which deprived the County Court of Highland county of all jurisdiction in road cases, and conferred that jurisdiction upon the Board of Supervisors. Acts, 1887-8, p. 68. The act contains no saving clause providing for the transfer of pending cases to the Board of Supervisors, and therefore, upon familiar principles, these proceedings lapsed with the repeal of the statute by whose authority they were instituted, and were never afterwards renewed before the Board of Supervisors. *Dulin's Case*, 91 Va. 718, 20 S. E. 821; *Yeatman v. U. S.*, 5 Cranch. 283, 3 L. Ed. 101; *Ins. Co. v. Richie*, 5 Wall. 544, 18 L. Ed. 540; *The Assessor v. Osborne*, 9 Wall. 575, 19 L. Ed. 748; *Railroad Co. v. Grant*, 98 U. S. 398, 401, 25 L. Ed. 231; *South Carolina v. Goillard*, 101 U. S. 433, 25 L. Ed. 937; *Todd v. Lantz*, 12 Am. Dec. 479; n. pp. 480, 481; *Hunt v. Jennings*, 33 Am. Dec. 466; Sedgwick on Constr. Stat. (2nd Ed.), p. 108, n. A, and pp. 111, 112.

It also appears that the only provision made to remunerate any land owner for property proposed to be taken for public use, is found in the last order of the County Court, which certifies to the Board of Supervisors \$100, as just compensation to one of the proprietors for a change in the location of the proposed road on his premises; but even that allowance the Board of Super-

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visors declined to make until the road should be completed the entire distance at least five feet wide and not to exceed five degrees in grade at any point—conditions which were never complied with, and the order, by its terms, stood revoked.

The word “road,” in its generic sense, means all kinds of ways, whether they be carriage-ways, driftways, bridleways, or footways; but in the narrower statutory use of the term in this State it signifies a turnpike, State road or county road, and contemplates a suitable way in width and grade for the convenient passage of vehicles. Va. Code, 1904, sec. 3878.

As early as October, 1748 (22 George II), an act was passed by the General Assembly, to take effect June 10, 1751, prescribing thirty feet as the standard width for public roads, and that requirement has been adhered to in the general statutes of the State down to the present time. 3 Henning’s Stat. at Large, 392-94; 6 Idem., 64-65; Va. Code, 1904, sec. 944a (2).

The authority conferred by the last mentioned section to order a different width in establishing new roads is for the purpose of enabling the tribunal charged with that duty to meet the exigencies of exceptional cases. It has never, however, been construed as warranting the establishment of a way of inferior dignity to a “road,” and must be exercised subject to the implied limitation that the character of the way as a “road” shall be maintained. Consequently, in the absence of special statutory authority, the action of the County Court in thus attempting to establish a bridleway “for horse-back travel” was plainly in excess of its jurisdiction and void.

Accordingly, it has been held by the Supreme Court of Missouri, in *Hughes v. Mermod*, 25 S. W. 891—in construing a statute of that State which declares that a public road should be “not less than thirty nor more than sixty feet wide, to be determined by the County Court, according to the utility and necessity of such road”—that the County Court had no jurisdiction to establish a road outside the discretionary limits fixed by statute.

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The county authorities have never recognized the proposed route as a public road, nor made any appropriation for its location, construction or maintenance; and the proceedings, so far as the public are concerned, had to all intents and purposes been finally abandoned years before the institution of this suit in 1900. It cannot be that this abortive attempt on the part of the appellees to convert a bridleway into a public road furnishes any legal grounds for the injunctive relief accorded to them by the decree appealed from.

The remaining contentions of appellees, namely: That there has been a dedication of the road to the public, or, else, that they have acquired a private right of way along its route, are also unsustained. The law on the subject is well settled, that "the mere user of a road by the public, for however long a time, will not constitute a public road; that a mere permission to the public by the owner of land to pass over a road upon it, is, without more, to be regarded as a license, and revocable at the pleasure of the owner; that a road dedicated to the public must be accepted by the County Court upon its records before it can be a public road." *Com. v. Kelly*, 8 Gratt. 632, and note Va. Rep. Anno. *Harris' Case*, 20 Gratt. 833; *Talbott v. R. & D. R. Co.*, 31 Gratt. 688; *Gaines v. Merryman*, 95 Va. 660, 29 S. E. 738.

With respect to what is requisite to constitute a private easement, it has been held: "That the use and enjoyment of what is claimed must have been *adverse, under a claim of right, exclusive, uninterrupted*, and with the knowledge and acquiescence of the owner of the estate in, over, or out of which the easement prescribed for is claimed." Washburn on Easements and Servitudes 4th Ed.), p. 150; *Gaines v. Merryman, supra*; *Reid v. Barnett*, 101 Va. 47, 43 S. E. 182.

The matters of estoppel relied on in this connection, such as the payment of money by McClung for work done upon certain sections of the route, and the like, do not apply to all the proprietors, and the record fails to disclose that the appellees have been thereby induced to injuriously alter their position in

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any particular with regard to the controversy. Without prolonging this opinion, therefore, to enter upon a specific discussion of the evidence, it is only necessary to observe that it falls far short of establishing any of the foregoing assertions.

It follows from what has been said that the decree appealed from is erroneous, and must be reversed; and this court will enter such decree as the Circuit Court ought to have entered.

Reversed.

Statement.

Richmond.

WOLVERTON v. HOFFMAN.

November 23, 1905.

1. **DEEDS—Construction—Case at Bar—Diminishing a Fee Simple.**—A grant by a husband to his wife in fee simple, followed by a “request and desire that the said property shall be the property of X during his lifetime, and then to descend to his children, that is, should he, X, survive” the grantor and his wife, vests in the wife a fee-simple estate. While a deed is to be read as a whole, and effect given to every part, if possible, in order to carry out the intention of the parties, yet where a fee simple is given in one part of the deed by clear, unambiguous and explicit words, it is not to be diminished or destroyed by subsequent words in the deed less clear and decisive than those which create it.

Error to a judgment of the Circuit Court of Shenandoah county, in an action of ejectment. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The portion of the deed not set out in the opinion of the court is in the words and figures following, to-wit:

“This deed made this 18th day of September, A. D. 1884, between George Wolverton of the one part and Leannah Wolverton, his wife, of the other part and George Wolverton, trustee for Leannah Wolverton of the third part, all of Shenandoah county, and State of Virginia.

“Witnesseth that for and in consideration of the sum of one dollar in hand paid by the said party of the second part to the

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party of the first part and in consideration of the natural regard that he the said Wolverton has and bears for her, said Leannah Wolverton. The said George Wolverton has granted, bargained and sold, and by these presents does grant, bargain and sell to said Leannah Wolverton, her heirs and assigns, three pieces or parcels of land situated in said county of Shenandoah, Virginia, lying on the Fadeley road and near Fadely's saw mill, containing in all 63 $\frac{1}{4}$ acres, be the same more or less, and also the personal property now owned by said George Wolverton as follows, viz: 2 horses, 4 cows, 4 head of young cattle, 18 head of sheep, 15 head of hogs and shotes, 1 buggy and harness, all my farming implements and machinery, and all the household and kitchen furniture that I now possess and own."

Walton & Walton and Barton & Boyd, for the plaintiff in error.

Tavener & Bauserman, for the defendant in error.

KEITH, P., delivered the opinion of the court.

The plaintiff in error instituted an action of ejectment against S. J. Hoffman, to recover a parcel of land lying in the county of Shenandoah; and to maintain the issue on his part introduced a deed from George Wolverton to Leannah Wolverton, his wife, by which was conveyed certain real and personal estate. It is declared in this deed, that "it is distinctly understood by and between the parties to this instrument, that the foregoing conveyance is made to be free of and from all debts, claims and demands against said George Wolverton or any other husband that the said Leannah Wolverton may hereafter take (should she survive her present husband), and that said Leannah Wolverton shall have the right to sell and convey the property or any part thereof, at any time that she deems proper in the interest of herself and her husband, George Wolverton, and execute a title for the real estate so sold, such as is legal for a

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married woman to make, in uniting in a deed or other conveyance, by his joining in the deed. It is also distinctly understood by and between the parties to this deed that I request and desire that said property shall be the property of Winfield Scott Wolverton during his lifetime, and then to descend to his children, that is, should he, W. S. Wolverton, survive the said George and Leannah Wolverton. And the grantor hereby covenants that he has the right to convey the property herein and hereby conveyed, that the same is free from incumbrance, and warrants the title to the same generally."

George Wolverton died in the lifetime of his wife, and W. S. Wolverton survived her. By her will she devises the real estate in controversy to Samuel J. Hoffman; and the only question before us arises upon a construction of the deed above quoted.

The deed under consideration conveys in plain and unambiguous terms a fee simple to Leannah Wolverton. It then says, that it is "understood by and between the parties to this deed that I request and desire that said property shall be the property of Winfield Scott Wolverton during his lifetime, and then to descend to his children, that is, should he, W. S. Wolverton, survive the said George and Leannah Wolverton." W. S. Wolverton did survive George and Leannah Wolverton, and the contention is, upon the part of plaintiff in error, that under this deed Leannah Wolverton took a fee, which, in the event of George Wolverton dying in her lifetime and W. S. Wolverton surviving her, was reduced to a life estate. In support of this contention, plaintiff in error relies upon the intent of the grantor, to be gathered from reading the entire instrument, and from which he contends that it is made to appear, that it was the intention of George Wolverton, in the contingency mentioned—that is, that his wife survived the grantor and that W. S. Wolverton survived her—that she should take only a life estate, with remainder to W. S. Wolverton for life, and to his children in fee.

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In support of this contention he places great reliance upon the case of *Colton v. Colton*, 127 U. S. 300, 32 L. Ed. 138, 8 Sup. Ct. 1164, where the will says: "I give and bequeath to my said wife, E. M. Colton, all of the estate, real and personal of which I shall die seized and possessed or entitled to. I recommend to her the care of my mother and sister and request her to make such gift and provisions for them as in her judgment will be best." The wife not having made any provision, the mother and sister brought suit, and the court held, that "no technical language is necessary for the creation of a trust in a will and no general rule can be formulated for determining whether a devise or bequest carries with it the whole beneficiary interest, or whether it is to be construed as creating a trust.

. . . If a trust is sufficiently expressed and capable of enforcement, it is not invalidated by being called 'precatory.'

. . . If the objects of the supposed trust are definite and the property clearly pointed out, if the relations between the testator and the supposed beneficiary are such as to indicate a motive on the part of the one person to provide for the other, and if the precatory clause, expressing a wish, authority or recommendation that the donee shall apply the property to the proposed *cestui que trust*, warrants the inference that it is precatory, then it may be held that an obligatory trust is created which may be enforced in a court of equity."

We are, however, in a court of law, where the plaintiff must recover upon the strength of his own title. We need not, therefore, consider whether or not the language created a trust, for it would be unavailing if such were the case.

Plaintiff in error also relies upon what is without doubt true, that courts, whether of law or of equity, in the construction of written instruments, seek to gather the intention from an examination of the whole paper, and not merely from its disjointed parts, so as to give effect to the whole. The intention of the grantor is to be sought after, and, when discovered, is to be carried into effect, if it can be done consistently with

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the rules of law. Courts will not only look through the entire deed, but will transpose words or sentences, if thereby they can effectuate the intent of the grantor without defeating the intent in any other part. But if in a deed there be two clauses so repugnant to each other that they cannot stand together, the first shall be received and the latter rejected, differing in this respect from a will. *Blackwell v. Blackwell* (N. C.), 32 S. E. 677.

The rule upon the subject is well expressed in Devlin on Deeds, section 837, where it is said: "The intent, when apparent and not repugnant to any rule of law, will control technical terms, for the intent, and not the words, is the essence of every agreement. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every part of it meaning and effect." But like most rules it has its exceptions. In section 838a, the same author says: "The question is not always one of intent, but of enforcing established and well-defined principles of law," and in that connection cites *Maker v. Lazell*, 83 Me. 562, 22 Atl. 474, 23 Am. St. Rep. 795, where the court says: "The defendant invokes the broad proposition that, in considering written instruments, courts should always seek for the actual intent of the parties, and give effect to that intent when found, whatever the form of the instrument. The proposition has been stated perhaps as broadly as this in text-books and judicial opinions, but it is not universally true. It is hedged about by some positive rules of law, which the parties must heed if they would effectuate their intent, or avoid consequences they did not intend. Muniments of title, especially, are guarded by positive rules of law, to secure their certainty, precision, and permanency. If, in the effort to ascertain the real intent of the parties, one of these rules is encountered, it must control, for no positive rule of law can be lawfully violated in the search for intent."

In *Gaskins v. Hunton*, 92 Va. 528, 23 S. E. 885, this court

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said: "It is a settled rule of construction, both in deeds and wills, that if an estate is conveyed, or an interest given, or a benefit bestowed in one part of the instrument, by clear, unambiguous, and explicit words, such estate, interest, or benefit is not diminished nor destroyed by words in another part of the instrument, unless the terms which diminish or destroy the estate before given be as clear and decisive as the terms by which it was created."

We have seen that the fee simple is conveyed to Leannah Wolverton by the deed under consideration in clear, unambiguous, and explicit words. The language relied upon to reduce that interest from a fee simple to a life estate is not apt and proper for the creation of any estate whatsoever. It cannot be said that it diminishes the estate given by language as clear and decisive as that by which it was created.

The judgment of the Circuit Court is affirmed.

Affirmed.

Statement.

Richmond.**BRYAN V. THE AUGUSTA PERPETUAL BUILDING AND LOAN
COMPANY.**

November 23, 1905.

1. BUILDING ASSOCIATIONS—*Usury—Power of Legislature—Act of March 1, 1894.*—It is within the power of the Legislature to designate what transactions shall be subject to, and what shall be exempt from, the influence of the laws against usury. By Act approved March 1, 1894, the Legislature legalized certain contracts to be thereafter made by Building Fund Associations, which had theretofore been regarded as usurious. The contract in suit was made after the passage of that Act, and is within its provisions. By it a borrowing stockholder agreed to make certain quarterly payments on his stock and to pay interest on the whole sum loaned, quarterly every year until his stock was paid up in full, and this was held to be valid. ..

Appeal from decrees in chancery of the Corporation Court of the city of Staunton, in the suit of *E. M. Pendleton, trustee*, against *The Augusta Perpetual Building & Loan Company*, and its trustees and the appellant. The decrees were in favor of the Building & Loan Co., and adverse to Bryan and Pendleton, trustee. Bryan appeals.

Affirmed.

Under the contract between Bryan and the Building Company, he contracted to pay to the company quarterly dues of \$225 each, and quarterly interest of \$40.50 each quarter, until such time as the 27 shares of stock for which he had subscribed, and which were pledged as a security for \$2,700 advanced to him

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by said company for the redemption of said stock, should be fully paid up. These sums were in accordance with the charter and by-laws of the company, as recited in the deed of trust given as a security for the amount advanced.

Sections 2 and 3 of the act of March 1, 1894, are as follows:

2. "It shall be lawful for every such association or company to fix by its by-laws the premiums or bonus at which it will dispose of the money in its treasury to its stockholders, and award or lend to any member or stockholder the value of any shares held by him less such premium or bonus, and the mode of making the disposal, loan or award shall be fixed by the by-laws, and to charge and receive said premium in advance, or in installments, or in default of application for said money by stockholders it shall be lawful for such companies or associations to lend the same to other persons on such terms as may be agreed upon and in such manner as may be fixed by the by-laws.

3. "Every association may levy, assess, and collect* from its stockholders dues or payments upon every share of its stock, the amount, time and manner of payment of the same to be fixed by the by-laws, and the said stock may be paid off and retired as the by-laws shall direct; and may levy, assess and collect from members to whom loans have been made interest upon the par value of the shares redeemed; and may levy, assess and collect fines for the non-payment of dues or for failure to comply with or perform any other obligation or duty to the association. The amount of the respective fines shall be fixed by the by-laws, and they shall be imposed under regulations to be made by the by-laws."

G. D. Letcher and Curry & Glenn, for the appellant.

Ker & Kerr, for the appellees.

WHITTLE, J., delivered the opinion of the court.

This suit was instituted by creditors of the appellant, whose

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debts are secured by a deed of trust on the land in controversy, to enjoin a sale of the property under a prior deed of trust for the benefit of the appellee, on the grounds that the title thereto is under a cloud, which it is insisted ought to be removed before sale, and that the debt of the appellee is usurious.

The cause was thrice referred to a commissioner in chancery, whose findings were adverse to both contentions; and from decrees confirming those reports, and subjecting the land to sale to satisfy liens, this appeal was allowed.

It appears that the alleged clouds upon appellant's title are imaginary rather than real. But even if the supposed defects had existed originally, they have long since been cured by lapse of time, appellant having been in the uninterrupted, honest and adverse possession of the land, under color of title, from the year 1877 to the present time.

With regard to the second contention: On May 22, 1894, Bryan subscribed for twenty-seven shares of the capital stock of the appellee company, of the par value of \$100 each, and at the same time borrowed of the company \$2,700, partly on the credit of the stock and with the deed of trust in question as additional security.

In the state of the law prior to March 1, 1894, the exactions demanded by the contract would doubtless have rendered the transaction usurious. *Crabtree v. Old Dom. Bldg. & L. Assn.*, 95 Va. 670, 29 S. E. 741, 64 Am. St. Rep. 818. But on that day an act entitled, "an act to define the power and limitations of building and loan associations," was passed by the Legislature, legalizing such contracts, and this loan comes within its provisions. *Acts*, 1893-94, p. 560.

In *Smoot v. Peoples Perpetual Bldg. & L. Assn.*, 95 Va. 686, 29 S. E. 746, 41 L. R. A. 589, it was held, that "it is within the power of the Legislature to designate what transactions shall be subject to, and what shall be exempt from, the influence of the laws against usury. It may take away the defense of usury, or it may remove a disability to contract which it had

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previously imposed; and, though a court cannot by charter create a corporation with power to make contracts contrary to the usury laws, the Legislature may. In the case in judgment, the Legislative enactment has rendered valid contracts which were previously usurious, and this is a valid exercise of power."

There were other assignments of error, but they were either expressly abandoned, or not pressed in argument, and, being without merit, do not require further notice.

The decrees are plainly right and must be affirmed.

Affirmed.

Syllabus.

Richmond.

LANE BROTHERS & COMPANY V. BOTT.

November 23, 1905.

1. **NEW TRIAL.—Admission of Illegal Evidence—Demurrer to Evidence—Case at Bar.**—As a general rule, if the admission of illegal evidence may have been prejudicial, even though it is doubtful whether it was or not, it is reversible error, but the general rule is subject to the exception that if in such case there is a demurrer to evidence, and an alternative verdict, and, after disregarding upon such demurrer such illegal evidence introduced by demurree and treating the residue of the evidence as is proper under the rules applicable to demurrers to evidence, there is plainly enough evidence to sustain a judgment for the demurree, the admission of the illegal evidence will not reverse, otherwise it will.
2. **DEMURRER TO EVIDENCE—Contributory Negligence—Convicting Evidence—Case at Bar.**—In an action to recover damages for personal injuries, the burden is on the defendant to establish the contributory negligence of the plaintiff. If the jury might have found the plaintiff not guilty of contributory negligence, it is the duty of the court, upon a demurrer to the evidence, by the defendant, so to decide. In the case at bar, it is unnecessary to invoke this rule, as the servant had the right to rely upon assurances given to him by a vice principal without employing precautions which ordinary prudence might otherwise have suggested.
3. **VERDICTS—Excessive —Case at Bar.**—The verdict of a jury in an action for personal injuries will not be set aside as excessive or unreasonable when there is no pretense that the jury were actuated by partiality or prejudice. In the case at bar the verdict was well warranted by the evidence.

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Error to a judgment of the Circuit Court of Shenandoah county, in an action of trespass on the case, overruling defendants' demurrer to the evidence. Defendants assign error.

Affirmed.

The opinion states the case.

Walton & Walton and Downing & Richards, for the plaintiffs in error.

Tavener & Bauserman and *Barton & Boyd*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This is a personal injury case in which judgment was rendered on behalf of the defendant in error (the plaintiff in the trial court) upon a demurrer to the evidence. It is a companion case to that of *Lane Bros. & Co. v. Bauserman*, 103 Va. 146, 48 S. E. 857; and as both cases had their origin in a common accident, reference may be had to the opinion in the latter for a concise statement of the facts in the former case.

The Bauserman case was submitted to a jury, and from an adverse verdict and judgment Lane Bros. & Co. obtained a writ of error to this court. The case was affirmed in all respects, except that the refusal of the lower court to permit certain questions to be answered was held to be reversible error. Hence, it may be remarked, that most of the assignments of error relied on here have been resolved adversely to the pretensions of the plaintiffs in error in the Bauserman case.

The open questions in this case involved, for the most part the action of the trial court with respect to the admission of certain alleged illegal testimony.

The general rule on the subject is that the improper admission of evidence, which may have been prejudicial, constitutes reversible error; and this is true even though it be doubtful

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whether in fact such evidence was or was not prejudicial. *Ins. Co. v. Trear*, 29 Gratt. 255; *Payne's Case* (Va. Rep. Anno.), 31 Gratt. 855, and note; *N. & W. Ry. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521.

But the general rule is subject to the exception, that "if in such case there is a demurrer to the evidence, and an alternative verdict, and, after disregarding upon such demurrer such illegal evidence, and treating the balance of the evidence as is proper under the rules applicable to demurrers to evidence, there is plainly enough evidence to sustain a judgment for the demurree, the admission of the illegal evidence will not reverse, otherwise it will." *Taylor v. B. & O. R. Co.* (W. Va.), 10 S. E. 29.

From the standpoint of a demurrer to the evidence, applying the foregoing exception to the case in hand, the admissible, relevant evidence is ample to sustain the judgment under review. In that aspect, the case presented is briefly as follows: The defendant in error, who was a laborer in the rock quarry of the plaintiffs in error, was absent from the quarry when the hole in question was loaded, and on his return several days afterwards was ordered by the acting superintendent to drill out the hole, when, in response to the direct inquiry, he was informed that it was not loaded. In obedience to orders, and relying upon the assurance of the vice-principal, he and his unfortunate companions, operating a heavy, twelve-foot steel churn-drill, drove down upon a charge of powder, capped with an electric exploder; whereupon the explosion which resulted inflicted the injuries complained of.

The plaintiffs in error seek to escape liability on the ground that the defendant in error was guilty of contributory negligence. The evidence on that point was conflicting. The burden of establishing it rested upon the plaintiffs in error, who saw fit, by demurrer to the evidence, to withdraw that question from the consideration of the jury. The rule in such case is, that if the jury *might* have found the demurree not guilty

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of contributory negligence the court *must* so find. But it is not necessary to invoke that principle in order to sustain the judgment of the trial court in this instance. The superintendent had lulled the defendant in error into a delusive sense of security by the false statement that the hole was unloaded, and he had a right to rely upon that assurance without employing precautions which ordinary prudence might otherwise have suggested.

Under these circumstances it is obvious that, upon a demurrer to the evidence, no other judgment could have been properly rendered in the case.

The remaining assignment of error, that the damages assessed by the jury (\$1,205) are excessive and unreasonable, is without merit. There is no pretense that the jury were actuated by prejudice or partiality in arriving at their verdict, and the serious character of the injuries sustained by the defendant in error fully justified their finding. His left hand was broken and otherwise injured; his face cut and burned with powder; and a section of his teeth "knocked loose." Besides, it appears that his wage-earning capacity has been reduced from \$1.25 to \$1.00 per day.

Upon the whole case, the judgment is plainly right, and must be affirmed.

Affirmed.

Syllabus.

Richmond.

COSMOPOLITAN LIFE INSURANCE CO. v. KOEGEL.

November 23, 1905.

1. LIFE INSURANCE—*What Constitutes*—Code, Sec. 3251.—A contract by which a benefit society agrees to pay a certain sum of money, on the death of a member, in consideration of the payment by the member of fixed sums at fixed periods, by whatever name called, is a life insurance policy within the meaning of Code (1904), Sec. 3251, permitting a complaint to be filed instead of a declaration in a formal action at law, and is not a mere certificate of membership in a benefit society within the purview of Acts, 1897-'8, p. 734.
2. LIFE INSURANCE—*Re-insurance*—Action by Policy Holder—Privity.—Where one company, for value, contracts to pay all losses sustained or to be sustained by another by reason of policies issued by the latter, the holder of a policy issued by the latter, may sue on the policy issued to him and recover from the first mentioned company damages for the breach. The law creates the duty and supplies the needed consideration wherever one party has money or property in his hands which in equity and good conscience belongs to another.
3. LIFE INSURANCE—*Re-insurance*—Code, Sec. 3251.—Where one company, for value, contracts specifically to pay a loss sustained by another under a policy of insurance issued by it, the policy becomes the contract of the first mentioned company, and the measure of its liability to the policy holder, and section 3251 of the Code permitting a complaint instead of a declaration to be filed is applicable to an action on it.
4. INSURANCE—Code, Sec. 3251 and 3252 Applicable to Procedure.—Sections 3251 and 3252 of the Code relating to actions on insurance policies are no part of the Insurance laws of this State within meaning of the act relating to benefit societies (Acts, 1897-'8, ch. 688), but simply relate to modes of procedure in a certain class of actions.

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5. PLEADING—*Declaration—What Sufficient.*—A declaration is sufficient which contains sufficient matter to enable the plaintiff to prove his case and so apprises the defendant of that case as to enable him to make defense.
6. LIFE INSURANCE—*Suicide—Proof Required.*—The defense of suicide, to avail, must exclude every hypothesis of accidental death. The party making the defense has the burden of proof. It will not be presumed. The mere fact that the body of an insured is found with a pistol in his hand and a bullet wound in his head is not sufficient to prove suicide.

Error to a judgment of the Circuit Court of Roanoke county on a complaint. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Archer A. Phlegar, for the plaintiff in error.

Smith & King, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

On the 12th day of October, 1897, the Royal Tribe of Joseph, calling itself a fraternal mutual benefit society, incorporated by the laws of Missouri, issued a certificate of membership to John Jacob Koegel, which provided that upon satisfactory proof of his death and surrender of the certificate two thousand dollars would be paid to Louie M. Koegel, his wife, out of the "Ideal" Division of the Mortuary Fund of the Royal Tribe of Joseph, upon condition that the laws of the society relating to such certificate were complied with, and that it was issued and accepted upon the terms and conditions of the laws of the society then in force, or which might thereafter be adopted.

John Jacob Koegel died August 29, 1903, in the county of Roanoke, Virginia, from a wound inflicted by a pistol in his hand, whether intentionally or accidentally is unknown. Before and at the time of his death, section 233 of the laws of the

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society was in force, and provided among other things, that "no benefit shall be payable on account of the death, accident or disability of any member by his own hands, whether sane or insane."

On the 17th of October, 1903, after the death of Koegel had been reported to the society, the Royal Tribe of Joseph and the Cosmopolitan Life Insurance Association, a corporation of Illinois, entered into a contract in writing "for consolidation of the two societies," as stated in the contract, whereby in consideration of the transfer to it of the assets of every kind, business and goodwill of the Royal Tribe of Joseph, the Cosmopolitan Life Insurance Association, among other things, assumed "all liabilities of the said Royal Tribe of Joseph on certificates of membership upon which death had been reported, and which were at the date of said contract unpaid;" and this assumpsit included the liability, if any, upon the certificate of Koegel. Thereafter the Cos. L. Ins. Co., in writing, specifically assumed the payment of certificate No. 7,216, issued by the Royal Tribe of Joseph on the life of Koegel, and contracted to carry out the provisions thereof in accordance with its terms, etc.

On the first Monday in March, 1904, Louie M. Koegel filed in the Circuit Court of Roanoke county a complaint in writing against the Cosmopolitan Life Insurance Association, such as is provided by section 3251 of the Code, as amended by the Acts of 1895-6, p. 707, and filed therewith the said certificate issued by the Royal Tribe of Joseph.

The said complaint sets out the foregoing facts and also avers that for a valuable consideration the Royal Tribe of Joseph issued the said certificate as an insurance policy on the life of John Jacob Koegel, by which the Royal Tribe of Joseph agreed to pay on the death of said John Jacob Koegel to the plaintiff, who was the wife of said John Jacob Koegel, the sum of two thousand dollars; that in consideration of the transfer to the defendant of the assets, business and property of

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the Royal Tribe of Joseph, the defendant expressly agreed to pay and did assume to pay all liabilities which the said Royal Tribe Joseph, on its policies of insurance, was under to its policy holders, and especially assumed and agreed to pay the liability of the Royal Tribe of Joseph to the plaintiff under said policy No. 7,216; and that the plaintiff thereby became and is entitled to demand and recover of the defendant the sum of two thousand dollars, with interest thereon from the 29th day of August, 1903, which by the terms of said policy of insurance the said Royal Tribe of Joseph did agree to pay her, and which by the terms of the agreement and transfer aforesaid between said Royal Tribe of Joseph and the defendant, the defendant did agree to pay her. It further avers that the said John Jacob Koegel and that she, the plaintiff, have performed all the conditions of said policy and violated none of its prohibitions; yet, notwithstanding this, neither the Royal Tribe of Joseph nor the defendant has paid to the plaintiff the said sum of two thousand dollars and interest aforesaid, nor any part thereof; but on the contrary although requested so to do hath hitherto wholly refused to pay the said sum or any part thereof, and that therefore the plaintiff files this her complaint and prays that judgment may be entered against the defendant for the sum of two thousand dollars, with interest as aforesaid, etc.

To this complaint the defendant demurred, assigning as grounds of demurrer: (1) That the certificate filed with the complaint was not a policy of insurance within the meaning of sections 3251 and 3252 of the Code; and (2) That the assumption by the defendant of the liabilities of the Royal Tribe of Joseph did not give a right of action against the defendant under section 3251, but it could only be sued on its undertaking to pay the debt of the Royal Tribe of Joseph, if it was indebted to the plaintiff.

The demurrer was overruled, and thereupon the defendant tendered three pleas, which, on motion of the plaintiff, were re-

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jected; and thereupon the defendant pleaded *non assumpsit* and filed with its plea a statement of its grounds of defense, the third of which was the same matter in different form as was alleged in one of the pleas rejected, and on motion of plaintiff this ground of defense was stricken out. The defendant then filed two other pleas, issue was joined on these pleas and the plea of non assumpsit, and a trial resulted in a verdict and judgment against the defendant for two thousand dollars, with interest as claimed in the complaint.

We are asked to review and reverse this judgment on the grounds: (1) That the court erred in overruling the demurrer to the complaint; (2) The rejection of pleas Nos. 1 and 2; and (3) Because of the refusal of the court to set aside the verdict and grant a new trial as being contrary to the law and the evidence.

All that need be said as to pleas Nos. 1 and 2, rejected, is that they raise the same questions presented by the demurrer to the complaint or declaration, viz: (1) Does section 3251 of the Code apply to suits on certificates of membership such as was filed in this case; and (2) whether, if the certificate is a policy of insurance, the defendant could be sued thereon as it was no party thereto?

Was the certificate filed with the complaint or declaration a policy of assurance, such as is contemplated by section 3251 of the Code, as amended, is the first question to be considered.

In *Logan v. Fid. & Cas. Co.*, 146 Mo. 114, 47 S. W. 948, the opinion says: "The calling of a contract of insurance by any other name that may be adopted for business or conventional uses cannot make an agreement to pay to another a sum of money designated, upon the happening of an unknown or contingent event depending upon the existence of life, less a policy of insurance on life." See also *Toomey v. Sup. L. K. of P.*, 147 Mo. 129, 48 S. W. 936; *Aloe v. Fid. Mut. L. Asso.*, 164 Mo. 675, 55 S. W. 993.

In *Goodman v. Jed. Lodge, &c.*, 67 Md. 117, 9 Atl. 13, 13

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Atl. 627, it is said: "If a company organized for social purposes chooses to go into the insurance business, they must expect courts to deal with and adjudicate the rights of the policy holders upon the same principles they apply in the usual cases of life insurance."

"In some societies, the certificate issued by the supreme authority is to pay a certain amount to a designated beneficiary upon the death of a member. Where this is the case the certificate is in legal effect a policy of life insurance, governed by the rules of pleading applicable to ordinary actions on policies." *Elkhart M. B. & A. Asso. v. Houghton*, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 516.

After reviewing a great number of decisions distinguishing benefit societies from life insurance companies, Bacon, in his work on Ben. Soc. & L. Ins. sec. 52, vol. 1, says: "It follows from the foregoing adjudications that all benefit societies, whether corporations or mere voluntary associations, are strictly speaking insurance organizations whenever in consideration of periodical contributions they engage to pay the member, or his designated beneficiary, a benefit upon the happening of a specified contingency. Although they may also partake of the nature of clubs or fraternal societies, and although they are often technically not called insurance companies, we must admit that, whether the benefit be paid for sickness, or to provide burial, or to accumulate a fund out of which payments are to be made to beneficiaries of deceased members, the contract falls within the definition of an insurance contract, viz: 'An agreement by which one party for a consideration (which is usually paid in money, either in one sum, or at different times during the continuance of the risk), promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest.' It may also be asserted as a general principle that wherever or whenever a benefit society, paying a benefit to the beneficiaries of its deceased members, claims to be exempt from the operation of certain laws ap-

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plicable to persons or companies doing a life insurance business, it can only safely base such claim upon express provisions of its charter, or of the statutes exempting similar organizations from such liability. The association may be benevolent and charitable, and only incidentally provide benefits for its members or their beneficiaries, but nevertheless, when it contracts to pay a certain sum to the appointees of its members upon their decease, while in good standing, in consideration of certain contributions made by such members while living, it is doing a life insurance business. We shall find, as we proceed further to discuss the questions concerning the contracts and liabilities of benefit societies, that many of the principles of the law of life insurance are applied to these societies because they are in some respects simply life insurance companies doing business on a plan only partially different from that of regular life insurance organizations." See also *Commonwealth v. Wetherbee*, 105 Mass. 195; *Bank of Washington v. Hume*, 128 U. S. 195, 32 L. Ed. 375, 9 Sup. Ct. 41.

The rule sanctioned by the foregoing authorities in defining what is a life insurance policy and not a mere certificate of membership in a purely benevolent society, is, that a contract by which a company or association agrees to pay a certain sum of money on the death of a member, in consideration of the payment by the member of fixed sums at fixed periods, is a life insurance policy, by whatever name it may be called; and measured by this rule the certificate filed with the complaint in this cause is clearly a policy of insurance within the meaning of section 3251 of the Code, as amended, and not merely a certificate of membership in a benevolent society or beneficial association within the purview of chap. 688 of the Acts of 1897-8, p. 734.

With reference to the second ground of demurrer, while the defendant was not a party to the contract between the Royal Tribe of Joseph and John Jacob Koegel, as evidenced by the certificate filed with the complaint or declaration in this

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case, the complaint or declaration sets out the contract between the defendant and the Royal Tribe of Joseph of October 17, 1903, whereby the defendant specifically and definitely agreed in writing, for a certain consideration, to assume all liability of the Royal Tribe of Joseph on its certificates of membership upon which death had been reported and were unpaid at that date; and further avers, as we have seen, that the defendant thereafter in writing specifically assumed payment of the said certificate issued to John Jacob Koegel and contracted to carry out the provisions thereof in accordance with its terms, etc.

In *Johannes v. Phoenix Ins. Co.* (Wis.), 27 N. W. 414, 57 Am. Rep. 249, A was insured in the Standard Fire Ins. Co. of London, and that company, desiring to withdraw from business in the United States, sold and turned over to the Phoenix Ins. Co. its entire business and the good will of that business in the United States, together with a large amount in bonds and other property; in consideration of which the Phoenix Company re-insured all the risks of the Standard Company upon the property situated in the United States, and agreed that all losses arising under the policies of the Standard Company on such property after the date of the contract should be borne and paid and satisfied by the Phoenix Company, and the Supreme Court of Wisconsin held, that A might maintain an action against the Phoenix Company to recover a loss on the property covered by his policy in the Standard Company. That was a fire insurance policy, but upon a review of a number of authorities cited the conclusion is reached that the principle applies as well in cases when the contract is an insurance of property as where it is an insurance of life.

Among the cases cited in the opinion in that case, is *Glen v. Hope Mut. L. Ins. Co.*, 56 N. Y. 379, where the defendant had agreed with the Craftsmen's Assurance Company to re-insure the latter company on all its risks "for which policies of the said party of the second part (Craftsmen's Assurance Co.) are outstanding at this date, and hereby agree to issue all such

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policies and to pay the holders thereof all such sums as the party of the second part may, by force of such policies, become liable to pay . . . the liability for death losses to be limited to such deaths as may occur on and after this date."

It was held that the defendant was liable on the contract of re-insurance directly to the several holders of the policies for the whole amount insured thereby, and the action in that case was on the policies and not on the contract of re-insurance. In that case, also, the death of the insured occurred after the re-insurance, while in the case under consideration it occurred prior to the contract entered into by the defendant assuming to pay the claim originally against the Royal Tribe of Joseph, based on the certificate of membership which the deceased held at the time of his death. The opinion says, that on the death of the insured the Craftsmen's Company became liable to pay all its three policies, and the defendant, the *Hope Mut. L. Ins. Co.*, by reason of its agreement, also became liable for the same amount to the plaintiffs who had made demand upon the defendant therefor, and that on the facts of the case it was the settled law that the plaintiffs might maintain their action against the defendant on the three policies which by its agreement it had assumed.

The contract of October 17, 1903, was but a re-insurance directly to the several holders of the policies or certificates of membership in the Royal Tribe of Joseph, and specifically a contract of re-insurance directly to the beneficiary of the holder of the policy held by John Jacob Koegel and sued on in this cause, and we are of opinion that the said policy or certificate became the contract of the defendant and the measure of its liability to the plaintiff the moment it signed the agreement of October 17, 1903, and that, therefore, section 3251 of the Code is applicable to a suit on that certificate or policy. ✓

But it is argued on behalf of the defendant, that by reason of the provisions of chap. 688, Acts, 1897-8, which defines and regulates fraternal beneficiary associations, orders or societies,

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section 3251 does not apply, as the first section of that act provides that such orders or associations shall be governed by this act and shall be exempt from the provisions of the insurance laws of this State, and that the Royal Tribe of Joseph was a fraternal beneficiary association within the provisions of the act.

We think that the contention is not well founded, as the definition of fraternal beneficiary associations excludes from the operation of the act associations of the class to which the Royal Tribe of Joseph belonged, it having been an association doing a life insurance business and not a purely fraternal beneficiary association within the definition of the act. Furthermore, sections 3251 and 3252 are no part of the insurance laws of Virginia, referred to in that act, but simply relate to the form of declarations and defenses in a certain class of actions. *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487. The said act does not in terms repeal sections 3251 and 3252, nor are the two acts inconsistent. It was without doubt the object of the Legislature, in enacting sections 3251 and 3252 of the Code, to meet cases where insurance companies sought to escape liability upon technicalities in pleading.

But whether this action is founded upon the original policy of insurance issued by the Royal Tribe of Joseph to John Jacob Koegel or not, we are of opinion that the demurrer to the so-called complaint filed by the plaintiff was properly overruled, as the complaint contains every essential averment of a declaration in assumpsit. It sets forth the undertaking of the defendant to pay the policy No. 7,216 on the life of John Jacob Koegel, his death, the consideration for the undertaking of the defendant, and the breach or failure to pay, and demands the amount of the policy.

In *Austin v. Richardson*, 3 Call, 2 Am. Dec. 543, 205, the opinion says: "As he (defendant) had entered into an express undertaking, if he failed to perform it, the general allegation of the demand and refusal was sufficient."

"The test of the sufficiency of a declaration is to inquire

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whether it contains sufficient matter for the plaintiff to state and prove his case under it, and to afford defense to another suit brought for the same cause of action." 1 Barton's Law Pr., 296; *Roanoke National Bank v. Hambrick*, 82 Va. 135.

Section 3246 of the Code provides: "No action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the cause."

And section 3272 is as follows: "On a demurrer (unless it be to a plea in abatement), the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense, that judgment, according to law and the very right of the cause, cannot be given."

The Royal Tribe of Joseph promised and agreed to pay to the plaintiff two thousand dollars on the death of her husband. Her husband died August 29, 1903, and the debt then became due and payable. Subsequently, on October 17, 1903, as the complaint or declaration avers, the defendant promised and agreed, in consideration of the assets of the Royal Tribe of Joseph turned over to it, to pay, among others, this debt; and, further, at a subsequent date, specifically promised and agreed to pay this debt due to the plaintiff, evidenced by the certificate No. 7,216 of the Royal Tribe of Joseph.

But the defendant insists that as the plaintiff is a stranger to the consideration for which that promise and agreement was made, she cannot maintain this action, and that it could be maintained by the Royal Tribe of Joseph alone—this upon the theory that there must be a privity between the plaintiff and defendant in order to render the defendant liable to an action by the plaintiff on the contract. This is undoubtedly the general rule; but it has its exceptions like many other general rules.

That rule, as stated by Metcalf, J., in *Mellen v. Whipple*,

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1 Gray 321, and *Ross v. Milne*, 12 Leigh. 204, 37 Am. Dec. 646, and many other cases which need not be referred to, was recognized with express approbation by Mr. Justice Gray in *Carr v. National Security Bank*, 107 Mass. 45, 9 Am. Rep. 6, and in *Exchange Bank of St. Louis v. Wright*, 107 Mass. 41; 9 Am. Rep. 1; but he also carefully considers the exceptions to the rule, and they were regarded to be as firmly established as the rule itself. The principal exception referred to consists of those cases in which the defendant has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, by his acceptance of the money or property without objection to the terms on which it is delivered to him, to pay such creditors. See note to 1 Chitty on Pl., p. 5, where a number of cases are cited as belonging to a class in which it is said, "the law (in such cases) creates the privity and implies the promise."

In a lengthy note by Hare & Wallace, in 2 Am. Leading Cas., the authors, dealing with the rule of which we are speaking and the exceptions thereto, and citing a number of cases as authority for the conclusion they reach, say, at p. 182: "The authorities as a whole would seem to indicate, that when the intention of the parties is to confer a right of action on a third person who will be injured by the breach, the law will imply a promise in his favor, if the loss will fall primarily and exclusively on him, and the circumstances are such that a judgment in assumpsit will cover the whole ground and be adequate to the ends of justice."

Among the cases there reviewed as laying down the rule that privity is not essential in action *ex contractu*, is *Brewer v. Dyer*, 7 Cush. (Mass.) 339, where it is said by Bigelow, J.: "It is well settled in this Commonwealth that when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter,

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who would enjoy the benefit of the act, may maintain an action for the breach of such engagement. *Felton v. Dickinson*, 10 Mass. 287; *Hall v. Marston*, 17 Mass. 575; *Arnold v. Lyman*, Id. 400, 9 Am. Dec. 154; *Carnegie v. Morrison*, 2 Met. 382. In the latter case all the authorities are fully reviewed in the opinion of the court, and the rule of law clearly vindicated and established. It does not rest upon the ground of actual or supposed relationship between the parties, as some of the early cases would seem to indicate (*Dalton v. Poole*, 1 Vent. 218; 2 Walford on Parties, 1144) nor upon the reason that the defendant by entering into such an agreement has impliedly made himself an agent of the plaintiff . . . ; but upon the broader and more satisfactory basis, that the law operating on the acting parties creates the duty, establishes the privity and implies the promise and obligation on which the action is founded."

In *Hall v. Marston*, *supra*, Parker, C. J., states, that "it seems to have been well settled, heretofore, that if A promises B, for a valuable consideration, to pay to C, the latter may maintain assumpsit for the money;" and further says: "The principle of this doctrine is reasonable, and consistent with the character of the action of assumpsit for money had and received."

In *Dearborn v. Parks*, 17 Am. Dec. 206, it was held, that if one person, for a valuable consideration, makes a promise to another for the benefit of a third, the latter may maintain an action upon it, the opinion saying, that in cases of this description, although the promisor undertakes to pay the debt of another, yet he thereby pays his own debt, and that constitutes the operative mode and inducement by which he is actuated. To him it must be a matter of indifference whether he pays directly to his creditor or to his assignee. He pays no more, and he can be holden to pay but once.

The principle applied in the authorities just referred to is

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✓ but analogous to that often applied by this court in that class of cases to which *Langhorne v. McGhee*, 103 Va. 281, 49 S. E. 44, and the cases there cited belong, viz.: "Wherever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received."

Says the opinion by Keith, P., in *B. & O. R. Co. v. Burke & Herbert*, ^{102 Va. 843} cited in *Langhorne v. McGhee*, *supra*: "When the fact is found that the defendant has the plaintiff's money, and he can show neither legal nor equitable grounds for keeping it, the law creates the privity necessary to support an action on the part of the plaintiff to recover it." See also *Gaines v. Miller*, 111 U. S. 395, 28 L. Ed. 466.

In the one class of cases the principle is applied where it is money that the defendant has which equitably belongs to the plaintiff, and in the other where the defendant has either money or property in consideration of which he has promised to pay the debt due the plaintiff by his debtor, from whom the defendant acquired such money or property and to who the promise was made, and in either case the law creates the privity and implies the promise necessary to support an action on the part of the plaintiff to recover his debt of the defendant.

The principle and reasoning applied in both apply with equal force to the case at bar.

A number of decisions by the appellate courts of the State of New York, in harmony with the decisions of the Supreme Court of Massachusetts which we have cited, might also be cited, but we deem it unnecessary to do so.

It follows that the plaintiff is entitled to recover in this action, unless the defendant is relieved from liability for the debt sued for by the breach of some condition upon which it entered into the contract of October 17, 1903, with the Royal Tribe of Joseph, and the only breach relied on is that clause of the by-laws of the Royal Tribe of Joseph which we have

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quoted above, the effect of which was to relieve the Royal Tribe of Joseph and the defendant from the payment of the amount due to the plaintiff if John Jacob Koegel met with his death by suicide.

This brings us to the consideration of the last assignment of error, which is to the refusal of the Circuit Court to set aside the verdict of the jury on the ground that it is contrary to the evidence, the suicide of Koegel being the only defense relied on, on the merits of the case.

It is not denied that the burden of proving the defense of suicide was on the defendant, and the law is well settled, that "where the evidence of self-destruction is circumstantial, the defendant fails unless the circumstances exclude with reasonable certainty any hypothesis of death by accident or by the act of another." *Ieman v. Man. of Life Ins. Co.* (La.), 15 South. 388, 49 Am. St. Rep. 348, 24 L. R. A. 589; *Cox v. Royal Tribe of Jos.* (Or.), 71 Pac. 73, 60 L. R. A. 620, 95 Am. St. Rep. 752.

"The mere fact of the body of the insured being found with a pistol in his hand and a bullet wound in his head is not sufficient to prove suicide." *Union Mut. L. Ins. v. Payne*, 45 C. C. A. 193, 105 Fed. 172.

"The defense of suicide, to avail, must show that every hypothesis of accidental death is excluded by the evidence." *Boynnton v. Equitable L. A. Co.* (La.), 29 South. 490, 52 L. R. A. 687; *Brown v. Sun L. I. Co.* (Tenn. Ch. App.), 47 S. W. 415, 51 L. R. A. 252.

In *Standard L. I. Co. v. Thornton*, 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116, it is said: "Accidental death will be presumed, and this presumption must be overcome by the proof of facts which exclude every hypothesis of death except by suicide."

And in *Mut. L. I. Co. v. Wiswell* (Kan.), 44 Pac. 906, 35 L. R. A. 258: "Where the evidence as to whether the death was accidental or suicidal leaves the question in doubt, the presumption is in favor of accident."

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To the same effect is 2 Bac. Ben. Soc., p. 849, where it is said, that "the presumption of law is that where a dead body is found and there is no direct evidence as to the cause of death, that death was not by suicide."

We only deem it necessary to say, with reference to the evidence, that it does not show a single circumstance connected with or surrounding the death of John Jacob Koegel that is not as consistent with accident as with suicide; and therefore it is clearly a case in which this court would not be warranted in disturbing the verdict of the jury.

Upon the whole case, we are of opinion to affirm the judgment of the Circuit Court.

Affirmed.

Syllabus.

Richmond.**FISHER'S ADMINISTRATOR V. CHESAPEAKE & OHIO
RAILWAY COMPANY.**

December 7, 1905.

Absent, Harrison, J.

1. **MASTER AND SERVANT—*Railroads—Safe Place—Cuts—Overhanging Materials—Track Walker.***—It is the duty of the master to use ordinary care to provide for the servants, a reasonably safe place in which to work. In the case of railroads this duty involves not only the proper construction, but also the proper maintenance and inspection of the roadbed and track. Cuts are as much a part of the tract as fills and bridges, and it is the duty of the railroad company to use due care to prevent the obstruction of its track by land slides, or the casting thereon of other debris created by the common processes of nature. The fact that the company keeps a track walker to examine cuts and warn approaching trains of dangers does not excuse it from the duty it owes of removing earth, stone, or other material in dangerous proximity to the cut, and which is in a condition to slide or fall upon the track.
2. **ORDINARY CARE—*When Question for Jury—Demurrer to Evidence—Case at Bar.***—What is ordinary care depends on the facts and circumstances of the particular case. If, upon the facts, reasonable men may fairly arrive at different conclusions, then the question of negligence is one for the jury, and, if the case be heard upon a demurrer to evidence by the defendant, judgment should be entered for the plaintiff. In the case at bar, the evidence was conflicting as to whether the defendant was negligent in failing to remove stone which rolled down upon the track and caused the injury complained of, and hence on its demurrer to the evidence, judgment should have been given for the plaintiff.
3. **CONTRIBUTORY NEGLIGENCE—*Conflicting Evidence—Demurrer to Evidence—Case at Bar.***—The evidence as to whether the plaintiff's in-

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testate was guilty of contributory negligence was conflicting, and, therefore, upon the defendant's demurrer to the evidence, that question should have been decided in favor of the plaintiff. The evidence strongly tended to show that the plaintiff's intestate was not guilty of negligence in remaining at his post of duty while many others, who had no duty imposed upon them, remained at the same place.

Error to a judgment of the Circuit Court of Bedford county, in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

Caskie & Coleman and *Frank T. Glasgow*, for the plaintiff in error.

Harrison & Long, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This action was brought by the plaintiff in error to recover damages for the death of his intestate, which is ascribed to the negligence of the defendant.

The case arose as follows: Fisher had been employed for many years by the defendant in the capacity of locomotive engineer on its passenger trains on the James River Division, a line of road extending from the city of Richmond, along James river, to Clifton Forge. The road was built by the predecessor in title of the defendant, the Richmond and Alleghany Railroad Company, in the year 1881, and was located principally upon the old tow-path of the James river and Kanawha canal.

For the distance of three-fourths of a mile, including the point at which the accident happened, in a westerly direction, the river is on the right-hand side of the track; while on the

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shore side there are a series of bluffs, with intervening ravines, rising abruptly from the water-line in some places to the height of 200 feet, along the base of which the road-bed has been cut, and the face of which forms its southern side or wall.

The property was transferred to the present company in the year 1887, and has been since that time operated by it. In its operation the defendant exercises control over these bluffs, and keeps a watchman continuously on the beat in question, whose duty it is to keep a lookout for rocks, trees and other obstructions likely to fall or wash upon the track, and remove them when practicable, or else flag approaching trains.

On Sunday, December 29, 1901, the regular west-bound passenger train having been delayed by an accident east of Lynchburg, the passengers and baggage were transferred to a special train, composed of an engine and tender, a combination baggage and express car, and a passenger coach. This special train left Lynchburg for Clifton Forge about six o'clock in the evening, two hours behind schedule time.

The watchman on the beat in question was returning from the western end of his course, and had proceeded about one-fourth of a mile eastward when he heard the train blow for Reusens, a station four miles west of Lynchburg, and two miles east of the scene of the accident, and stepped off the track to allow it to pass him. While thus waiting, he heard a rock fall on the track towards the eastern end of the bluff, and hurried forward waving his lantern across the track to stop the train.

The railroad approaches the bluff from the east on an 11° reverse curve, and at that point Fisher, in obedience to the rules of the company, reduced the speed of the train to "almost a stand-still," and came around the curve very slowly, but on clearing it he observed a white light ahead, and believing the track to be unobstructed increased his speed to fifteen miles an hour, which rate was maintained until the engine collided with a rock weighing about a ton, which had broken loose from the adjacent bluff and fallen upon the track between the rails.

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The rock was wedge-shaped and the pilot "rode up on it" with all the wheels of the engine except the back drivers. An examination showed that the engine was not seriously damaged, but it was impossible to replace it on the track, and a messenger was dispatched to Reusens to telegraph to Lynchburg for assistance.

It had been raining continuously for several days, and the night was intensely dark. The passenger coach was crowded, and the trainmen and most of the male passengers assembled in the baggage and express car, where they remained for more than a half hour awaiting assistance, smoking and discussing the accident. At intervals, during that time, gravel and rock were falling from the bluff above, and it was suggested that it would be safer for the passenger coach to be pushed back from under the bluff. Accordingly, with the assistance of the passengers, the coach containing the women and children was shoved back some sixty-five feet. Thereupon the conductor requested the passengers to aid in removing the baggage and express car also; and while the express messenger was engaged in uncoupling the car for that purpose, a large quantity of rock and earth fell from the side of the bluff upon and against the car, casting several men into the river, and part of the mass falling upon Fisher and the express messenger, held them fast, despite the efforts of their companions to release them, until they were overwhelmed and killed by another mass of matter which shortly thereafter came down upon them.

The trial court sustained a demurrer to the evidence and rendered judgment for the defendant; and the plaintiff brings error.

The defendant denies liability for the death of plaintiff's intestate on the grounds, that the evidence fails to show actionable negligence on its part; and also, that it establishes such contributory negligence on the part of Fisher as would defeat a recovery, even if the initial negligence of the railroad company had been proved.

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The relation of the parties being that of master and servant, the law imposed upon the defendant the duty of exercising ordinary care to provide for the safety of its servant while engaged in the discharge of his duties; and to that end required the use of ordinary care on the part of the company to furnish him a reasonably safe place in which to work.

Ordinary care is defined to be "such care as reasonable and prudent men use under like circumstances, in providing safe and suitable appliances and instrumentalities for the work to be done, and in providing generally for the safety of the servant in the course of his employment, regard being had to the work and difficulties and dangers attending it." *Bertha Zinc Co. v. Martin*, 93 Va. 804, 22 S. E. 869; *Richlands Iron Co. v. Elkins*, 90 Va. 261, 17 S. E. 890.

In the case of *Grand Trunk R. Co. v. Ives*, 144 U. S. 417, 418, 36 L. Ed. 485, 12 Sup. Ct. 679, it is said: "The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in the case was such as would be expected, of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury." *B. & O. R. Co. v. Griffith*, 159 U. S. 603, 611, 40 L. Ed. 274, 16 Sup. Ct. 105.

In case of railroad companies, the duty involves proper construction of the road-bed and track, primarily; and also the correlative obligation of maintenance and inspection.

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The principle is thus stated by the Supreme Court of the United States: "The railroad cut is as much a part of the railroad structure as is the fill. They are both necessary, and both are intended for one result, which is the production of a level track over which the trains may be propelled. The cut is made by the company no less than the fill, and the banks are not the result of natural causes, but of direct intervention of the company's work. If it be the duty of the company (as it unquestionably is), in the erection of the fills and the necessary bridges, to so construct them that they shall be reasonably safe, and to maintain them in a reasonably safe condition, no reason can be assigned why the duty should not exist in regard to the cuts. Just as surely as the laws of gravity will cause a heavy train to fall through a defective or rotten bridge to the destruction of life, just so surely will those same laws cause landslides and consequent dangerous obstructions to the track itself, from ill-constructed railway cuts. To all intents and purposes, a railway track which runs through a cut where the banks are so near and so steep that the usual laws of gravity will bring upon the track the debris created by the common processes of nature, is overhung by those banks. Ordinary skill would enable engineers to foresee the result, and ordinary prudence should lead the company to guard against it. To hold any other view would be to overbalance the priceless lives of the travelling public by a mere item of increased expense in the construction of railroads, and after all, an item, in the great number of cases, of no great moment." *Gleeson v. Va. Mid. Ry. Co.*, 140 U. S. 435, 440, 35 L. Ed. 458, 11 Sup. Ct. 859, 861.

It is not perceived that there can be any difference, in principle, between the duty of a railroad company with respect to the artificial banks of a cut, and natural banks and bluffs along the base of which it has chosen to locate its road. The mandate of the law which imposes upon companies the duty of using ordinary care to furnish the employee a reasonably safe place

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in which to work, is as imperative in the one case as in the other; and this rule is founded upon the just, reasonable and humane principle that where human life is at stake, such precautions must be taken as will afford reasonable assurance of its preservation.

In the case of *Union Pacific R. Co. v. O'Brien*, 181 U. S. 452, 459, 40 L. Ed. 766, 16 Sup. Ct. 618, 620, Chief Justice Fuller, in delivering the opinion of the court, says: "This engineer was entitled to rely upon the company as having properly constructed the road, and to presume that it had made proper inquiry in respect to latent defects, if there were any, in the construction, for such was its duty, and he cannot be held to knowledge of the danger lurking in this narrow seam in the mountain side by whose inequalities its sinuosities were hidden. We agree with the Circuit Court of Appeals that the Circuit Court properly instructed the jury in this regard, and that no error was committed in allowing the jury to consider the evidence in the light of its own judgment and knowledge, taking into consideration all the facts bearing on the defective construction in question."

So also in the case of *Bean v. Western N. C. R. Co.* (N. C.), 12 S. E. 600, the court observes: "The mass of stone just above and near to the railroad track on which trains were moved, were in condition, as to situation, to slide or fall upon the track, were dangerous, were a standing menace, and were allowed to be so for several years, and the agents of the defendants knew the fact. The stone ought to have been removed when the road was constructed. The fact that the defendant kept a "track walker" whose duty was to examine and see just after a train had passed the dangerous point, whether rock had fallen or was about to fall, cannot excuse the defendant. It was its serious duty to avert such dangers because it was obvious, could be seen, and ought to have been removed. It is not sufficient to be simply cautionary, when a manifest danger exists that may and ought to be removed." See also *Elledge v. Nat'l. City, &c., R. Co.* (Cal.), 34 Pac. 720, 38 Am. St. 290.

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In our view it is unnecessary, in either aspect of the case, to enter upon a circumstantial discussion of the evidence.

Upon the first proposition, involving the question of the defendant's negligence, considered from the standpoint of a demurrer to the evidence, there is no escape from the conclusion that the evidence strongly tended to establish it. It was in testimony that the bluff, at the point of the accident, appeared to be, *and was believed to be*, in an unsafe condition; that it was not solid but seamed; and that there was a dry crack across the face of it, through which loose earth had exuded, which circumstance, in the opinion of some of the witnesses, indicated the presence of an earth pocket behind the surface of the rock. These conditions were discernible from the track beneath, and had been long known to the defendant's watchmen and supervisors of track. Yet the defendant had wholly failed to make it the object of special inspection, or test its stability by scaling or otherwise. In this state of the case, the trial court was not warranted in declaring, as matter of law, that the allegation of negligence on the part of the defendant had not been sustained. On the contrary, it is the settled doctrine of this court, that, under such circumstances, the question of negligence is one for the determination of the jury.

Thus in the case of *Kimball & Fink v. Friend*, 95 Va. 125, 140, 27 S. E. 901, 904, the court said: "The question of negligence in such a case is peculiarly one for the consideration of the jury. In *Carrington v. Ficklin*, 32 Gratt. 670, 676-7, the court, Judge Burks delivering the opinion, said: 'Where the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must be either certain and incontrovertible, or they cannot be decided by the court. Negligence cannot be

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conclusively established by a state of facts upon which fair-minded men may well differ.'” *Richmond & D. R. Co. v. Medley*, 75 Va. 499, 505, 40 Am. Rep. 734; *Winchester v. Carroll*, 99 Va. 727, 744, 40 S. E. 37.

On the issue raised by the defendant's second ground of defense, that plaintiff's intestate was guilty of contributory negligence, there was also a conflict of evidence. The witnesses were not agreed as to the character and size of the particles of gravel and rock, which, at intervals, fell from the bluff before the fatal slide occurred. It was conceded that the darkness of the night was so intense that it was impossible to discover the true condition of the face of the bluff, and the impression made on one of the witnesses was (to quote his own language), “that when the first small slide occurred, it left a ragged place; and the downfall of rain was washing down the gravel and dirt that had been torn up by the other rock in its passage down the cliff.” The fact that practically all the adult male passengers, some fifteen in number and of various occupations, volunteered, after the passenger coach had been pushed back from under the cliff, to assist the crew in removing the combination car, is convincing evidence of the fact that Fisher, in remaining at his post of duty, to say the least of it, was not guilty of negligence *per se*. Their collective opinion, as evidenced by their conduct, refutes that contention. Therefore, the question of his alleged contributory negligence was for the jury and not for the court.

In *Bass v. Norfolk Ry., &c., Co.*, 100 Va. 1, 8, 40 S. E. 100, 102, it was held: “Whether or not the plaintiff's intestate, under all the facts and circumstances of this case was guilty of contributory negligence is a question about which reasonably fair-minded men might differ. The inferences to be drawn from the evidence must be certain and incontrovertible, or they cannot be decided by the court.”

“It was, therefore, a question for the jury. And since the

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jury might have found for the plaintiff on the question of contributory negligence of the plaintiff's intestate, on the defendant's demurrer to the evidence, the court must so find." See also *Wood's Adm'x. v. Southern Ry. Co.*, *post* p. 650.

For these reasons we are of opinion that the judgment complained of is erroneous and must be reversed; and this court, proceeding to render such judgment as the Circuit Court ought to have rendered, will overrule the demurrer to the evidence, and enter judgment for the plaintiff in error for the damages awarded by the jury.

Reversed.

Statement.

Richmond.

SHANNON'S ADMINISTRATOR v. CHESAPEAKE AND OHIO
RAILWAY Co.

December 7, 1905.

Absent, Harrison, J.

1. RAILROADS—*Common Carriers—Express Messenger—Release.*—An express messenger who is injured through the negligence of a railroad company, over whose road he is being hauled, may recover from the railroad company, notwithstanding he has contracted in advance with the express company to release it and the railroad company from all liability for such injury. The contract is contrary to public policy, and void both at common law and by statute. Code (1904), Sec. 1294 c. (25).

Error to a judgment of the Circuit Court of Bedford county, in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

Reversed.

The facts, in addition to those stated in the opinion of the court, appear in the case of *Fisher v. Ches. & O. R. Co.*, ante, p. 635.

Lee & Howard and *Caskie & Coleman*, for the plaintiff in error.

Harrison & Long, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

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This case is controlled in all respects, except one, to which we shall presently advert, by the case of *Fisher's Administrator v. Chesapeake and Ohio Railway Company*, ante, p. 635, in which an opinion was handed down at the present term.

The cases arose out of a common accident, and were brought to recover damages for the death of Fisher and Shannon, respectively, alleged to have been caused by the negligence of the defendant. The trial court sustained a demurrer to the evidence in each case, and rendered judgment for the defendant; and the judgment in Fisher's case was reversed by this court in the opinion referred to.

In addition to other defenses, applicable alike to both cases, in the case under review the defendant filed a special plea, in which it averred, "that as a condition of its permitting the plaintiff's intestate to travel in its car over its line or railway, as express messenger in the employ of the Adams Express Company in his performance of his duties as such . . . plaintiff's intestate . . . entered into a contract in writing with said Adams Express Company, which contract was in force at the time the death of the plaintiff's intestate, whereby, in consideration of such employment and the compensation to be paid therefor, the said plaintiff's intestate did assume all risks of death or accident or damage to him or his property, whether from negligence or otherwise, and did release and discharge the said Adams Express Company and any connecting carrier, railroad company, express company or other person or company or connecting carrier (in this instance the defendant), in whose cars or other conveyance he might travel in the performance of his duties aforesaid, from any and all claims, liabilities and demands of every kind, nature and description for or on account of his death, or any injury or damage to his person or property of any kind or nature sustained by him, whether caused by negligence of the said Adams Express Company or any of said railroad companies, or other carriers or otherwise; and did further agree that he voluntarily assumed the risks of injury or death from said negligence or otherwise,

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and that none of said companies or persons should incur any further liability whatsoever than therein expressed by reason of permitting him to ride in said cars or other conveyance; . . . that at the time of the death of the plaintiff's intestate he was in an express car being transported by the defendant over its said line in pursuance of his contract with a said Adams Express Company, and not otherwise."

The Circuit Court sustained a demurrer to the plea; and that ruling is assigned as cross-error by the defendant.

It will be observed that the precise question presented by this plea is a narrow one, and involves the validity of the contract set forth therein under section 1294c (25), Va. Code, 1904.

The section reads as follows: "No agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid."

The status both of the express company and the defendant as "common carriers," is fixed by the legislative declaration that the phrase shall include every railroad company and express company chartered by this or any other State, and doing business in this State. Acts, 1891-2, p. 971.

The Virginia statute is merely declaratory of the common law doctrine, that contracts which stipulate for immunity from negligence are invalid as contrary to public policy, and emphasizes the legislative policy on that subject in the State. The language is so plain that an attempt at exposition would rather tend to obscure than elucidate the meaning of the statute.

In the recent case of *Norfolk & Western Ry. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721, this court, in construing the foregoing section, held: "That a person travelling upon a free pass is clothed with every right appertaining to a passenger for hire; and a railway company, having by virtue of the pass undertaken to carry the person to whom it is issued, is charged with the duty of transporting that person safely, even though by

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agreement signed by the passenger, it undertook to relieve itself from the consequences of the negligence of its servants; such an agreement being against the policy of the State is inoperative and void."

It is sought to withdraw this case from the precept of the statute, and the well-established rule of the common law upon which it is founded, and bring it within the influence of that line of authorities (of which the case of *B. & O. S. W. Ry. Co. v. Voight*, 176 U. S. 498, 44 L. Ed. 560, 20 Sup. Ct. 385, is a conspicuous type) which hold, that as it is not one of the duties of a common carrier to transport for an express company, its messenger and merchandise, the defendant could, therefore, contract with the express company for exemption from liability for the death of plaintiff's intestate, although occasioned by its own negligence; the express messenger also voluntarily entering into a contract with the express company, in consideration of his employment, that he would assume such risk, and absolve his employer and the defendant from all liability in the premises.

It will be seen that there is a marked difference between the contract set out in the plea in this case, and the tripartite agreement in the *Voight* case. The only parties to this contract are the express company and its servant, and its purpose is manifest. It stipulates, in the first place, to exempt the master from liability for its own negligence to its servant; and, secondly, undertakes to afford similar immunity to the defendant for its negligence. It is plain that such contract is violative both of the letter and spirit of the statute, and illegal. Indeed, independently of statute, the almost unbroken current of authority declares such contracts void.

The *Voight* case constitutes a distinct exception to the general rule, and the averments of the plea do not bring the defendant within the exception. If, notwithstanding the unmistakable policy of this State in the interest of human life and safety, we were disposed to follow that case rather than the

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line of authorities of which *Railroad Company v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, is an exponent, as to which no opinion is expressed, it would not be permissible to do so under the pleadings in this case.

It follows from what has been said that the demurrer to the plea in question was properly sustained.

As remarked, the case in its other aspects is ruled by the decision in the *Fisher Case*.

In *Voight's Case*, *supra*, at page 514, it is said of his relations as an express messenger to the railroad company: "He was there as a servant, engaged with the servants of the railroad company in the service of transportation on the road. His duties were substantially the same as those of the baggage-master in the same car; the latter relating to merchandise carried for passengers, and the former to merchandise carried for the express company. His actual relations to the other servants of the railroad corporation engaged in the transportation were substantially the same as those of the baggage-master."

Upon that theory, the defendant owed the plaintiff's intestate at least as high degree of care for his protection as it owed to its employee Fisher, and the judgment ought to be the same in both cases.

We are of opinion, therefore, that the Circuit Court erred in sustaining the demurrer to the evidence, for which error its judgment must be reversed; and this court, pronouncing such judgment as that court ought to have rendered, will overrule the demurrer to the evidence, and enter judgment for the plaintiff in error for the damages assessed by the jury.

Reversed.

Statement.

Richmond.**WOOD'S ADMINISTRATRIX *v.* SOUTHERN RAILWAY COMPANY.**

December 7, 1905.

1. **NEGLIGENCE—Case at Bar—Demurrer to Evidence.**—Upon the evidence in this case, the jury might have found that the plaintiff's intestate had the right to use a certain instrumentality, that he was using it in the performance of his duties at the time the injury complained of was inflicted, that it was in a defective condition, that the defendant was chargeable with knowledge of the defect and with negligence in not repairing it, and that the plaintiff was not chargeable with contributory negligence; and as the jury might have so found it was the duty of the court so to decide upon a demurrer to the evidence by the defendant.
2. **MASTER AND SERVANT—Safe Instrumentalities—Primary Use—Secondary Use.**—Although an appliance may be primarily intended for one purpose, if it is convenient and safe to use it for a secondary purpose, and it is so used by a servant with the knowledge of the master, and without objection on his part, he is chargeable with the duty of using ordinary care to see that such appliance is in a reasonably safe condition for such secondary use.
3. **EVIDENCE—Personal Injury—Preponderance of Evidence—Prima Facie Case.**—A plaintiff in an action to recover damages for a personal injury is no more required to prove his case beyond a reasonable doubt than in any other civil action. All that he is required to do, in order to make out a *prima facie* case, is to make it appear to be more probable that the injury was the proximate result of the defendant's negligence than of any other cause.

Error to a judgment of the Circuit Court of Amherst county, in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

Reversed.

Opinion.

The opinion states the case.

Caskie & Coleman, and *Strode & Tucker*, for the plaintiff in error.

Horseley & Kemp, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This action was brought by the personal representative of J. Buckner Wood, deceased, to recover damages for the death of his decedent, caused as alleged by the negligence of the Southern Railway Company.

Upon the trial of the cause, the defendant company's demurrer to the evidence was sustained, and judgment rendered in its favor. To that judgment this writ of error was awarded.

There was evidence tending to prove that about 10 o'clock on the night of February 7, 1904, one of the defendant company's freight trains from Alexandria, arrived at Monroe, a station on the defendant's road in Amherst county. The train was to be placed on a siding there, and the engine taken to the round-house. The front brakeman on the train not being acquainted with the switches at the station, the plaintiff's decedent, who was a yard brakeman, was ordered by the yardmaster to assist in "putting away" the train, and was engaged in that service when he lost his life.

The train came in from the North on the main track, and, after passing the depot, was switched to another track where the engine and tender were cut loose from the cars. The engine and tender proceeded over another switch to the main line, and were backed down that track with the intention of getting on the "lead" track through another switch so as to get to the round-house. As the train went south over the main line, and

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before the engine and tender were cut loose, the deceased lit a "fusee", which makes a flaming red light and burns about ten minutes, and stuck it in the ground to give warning to an approaching train from the south. After the engine and tender had been cut loose, and as they were backed north on their way to the round-house, the deceased picked up the lighted fusee, and with his lantern got on top of the tender of the engine and sat on its rear end, holding the fusee in his hand to signal the engineman, and to give warning to the train approaching from the south, and another which was expected from the north.

The position of the deceased was a proper one for the duties he had to perform.

When the engine and tender reached the switch over which they had to pass to reach the "lead" track, it was the duty of the deceased to throw or change the switch. As the engine and tender approached the switch, and were within a hundred or a hundred and twenty-five yards of it, running at the rate of about twelve miles an hour, the deceased was seen sitting on the "man-hole" on the rear end of the tender by the engineman, as he turned to shut off the steam and slow down his engine so as to go in on the switch. There was some slight hitch in reversing the lever and slowing down the engine, and when the engineman again looked in the direction his engine was backing he did not see the plaintiff's intestate, but took "it for granted", as he testified, "that he had gotten down and later would throw the switch."

As soon as the engine stopped, the attention of the engineer was attracted by the action of the car inspector upon the track over which the engine and tender had just passed. The engineer got off his engine and went back to the car inspector, where was found the dead body of plaintiff's intestate.

The car inspector, who was following after the engine, came first upon the lamp of the deceased, then the "man-hole"

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cover, and, a little nearer the engine, upon the dead body of the deceased, all between the rails of the track. The cross-ties and ballast between the ties showed that the man-hole cover and the body of the deceased had both been dragged some distance.

The man-hole, upon the cover or lid of which the deceased was sitting when last seen alive, and immediately before his death, is located in the centre of the rear of the tender, in a line with the top of the ladder leading up and down the rear end of the tender. The man-hole cover is about forty inches in length and twenty-one inches in width, oblong in shape, is made of iron, and has upon it an iron hand-hold parallel with the rounds of the ladder referred to above, and of about the same diameter, located on the side of the cover nearer the end of the tender; and the cover is fastened to the tender by hinges on the side next to the engine. It was the common practice of brakemen and others passing over the tender to use the hand-hold of the cover for the purpose of pulling themselves up on the tender from the ladder, and in letting themselves down the ladder. The location of the hand-hold was such that it was convenient and inviting, as well as in common use for those purposes, and there was nothing else by which a person ascending or descending the ladder could as conveniently and safely catch hold of. The hand-hold was also used for raising the man-hole cover to put water into the tank, and that was most probably its primary use.

About thirty miles from Alexandria, on the run from there to Monroe, the man-hole cover slipped when one of the brakemen caught hold of the hand-hold in coming up the ladder and getting on the tender from the rear. The hinges of the cover when found on the track after the accident were broken, one hinge showing a fresh break and the other an old break which

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was rusty and had the appearance of having been made some time before. When both hinges were in proper condition, there was no danger of the cover slipping or breaking loose by the use of the hand-hold in getting off or on the tender at the rear.

The contention of the plaintiff is that the proximate cause of the accident, which resulted in her decedent's death, was the failure of the defendant to exercise due care in keeping in a reasonably safe condition the man-hole cover, the hand-hold of which the deceased was using, and had the right to use, in performing his duty at the time of the accident.

The contention of the defendant, as to the negligence charged, is that it is not proved that the plaintiff's intestate had the right to use the hand-hold in getting off the tender; or, if he had, that he was so using it in the performance of his duty when he fell from the tender and was killed.

The evidence not only tends to prove, but the jury if the case had not been taken from them by the demurrer to the evidence, might properly have found, that one of the hinges of the man-hole cover was broken, and that it had been broken for so long that the defendant knew, or could by the exercise of reasonable care have known of its condition. The jury might have further found, even though the primary use of the hand-hold on the man-hole cover was to raise it for the purpose of putting water into the tank, that it was the most convenient and safe way for brakemen and others to get on and off the tender by way of the ladder at the rear end of the tender, and that it was their common practice to so use it, without objection by the defendant; and since it did not prohibit such use (which probably would have seemed absurd), it ought, therefore, to have exercised ordinary care in seeing that it was in a reasonably safe condition for such secondary use. *Coates v. Boston, &c. R. Co.*, (Mass.) 26 N. E. 864, 10 L. R. A. 769; *McIntyre v. B. & M. R. Co.*, (Mass.) 39 N. E. 1112.

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The jury might have further found that the deceased, when last seen alive, was sitting on the man-hole cover at the rear of the tender, in the performance of his duties, when the engine was within one hundred and twenty five yards of the switch, to change which was his next duty; that in discharging that duty in the customary and most speedy and convenient way he would have used the hand-hold on the man-hole cover in going down the ladder at the end of the tender, preparatory to getting on the ground to change the switch, and that while thus using the hand-hold, the other hinge on the man-hole cover was broken, and by reason thereof he fell, or was thrown, in front of the backing engine and tender and killed.

Upon all the facts and circumstances of the case, considered as on a demurrer to the evidence, we cannot say as a matter of law, that the injury complained of was not more naturally to be attributed to the negligence of the defendant than to any other cause. A plaintiff in an action to recover damages for personal injuries is no more required to prove his case beyond a reasonable doubt than in any other civil action. All that he is required to do to make out a *prima facie* case is, to make it appear to be more probable that the injury was the proximate result of the defendant's negligence than from any other cause. *Griffin v. Boston, &c., R. Co.* (Mass.), 19 S. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526; *Labatt on Master & Servant*, Sec. 835; *Marshall v. Valley R. Co.*, 99 Va. 798, 805, 34 S. E. 455; *Va. Iron C. & C. Co. v. Tomlinson*, ante, p. 249, 51 S. E. 362, 364; *Choctaw, &c., R. Co. v. McDade*, 191 U. S. 64, 48 L. Ed. 96, 24 S. E. 24.

It is insisted by the defendant that even if it was guilty of negligence in failing to exercise ordinary care to maintain the man-hole cover in a reasonably safe condition, and that the plain-

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tiff's intestate had the right to make use of the hand-hold thereon in getting off the tender, he was guilty of contributory negligence in attempting to do so under the facts and circumstances of the case.

Without discussing further the evidence in the case, and the proper inferences which the jury might have drawn from the facts and circumstances proved, it is sufficient to say that we are clearly of the opinion that if the jury had found that the plaintiff's intestate was not guilty of contributory negligence, the court could not have set aside the verdict because contrary to the evidence. We are of the opinion, therefore, that since the jury might have found for the plaintiff upon both the question of negligence and of contributory negligence, we must so find.

The judgment of the Circuit Court must be reversed, and this court will enter such judgment as that court ought to have entered.

Reversed.

Syllabus.

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NORFOLK & WESTERN RAILWAY COMPANY v. SPENCER'S
ADMINISTRATRIX.

December 7, 1905.

1. DEATH BY WRONGFUL ACT—*Expectancy—Mortality Tables*.—In an action to recover damages for death by wrongful act or neglect, standard tables of mortality may be introduced in evidence to show the probable expectancy of life of deceased.
2. RAILROADS—*Negligence—Contributory Negligence—Case at Bar*.—Although the engineer of a freight train which collides with a work train standing on the track may have been guilty of negligence which contributed to the accident, yet, if the engineer of the work train could, in the result, by the exercise of ordinary care and diligence, have avoided the accident which happened, then the negligence of the engineer of the freight train will not excuse the railroad company, whose servants they both are, and he may recover for the injuries inflicted on him by such collision. In the case at bar, the evidence was sufficient to warrant an instruction to this effect.
3. RAILROADS—*Negligence—Case at Bar—Collision with Work-train Out of Limits*.—In an action by a locomotive engineer against the railroad company whose servant he is, to recover damages for an injury resulting from a collision with a work-train standing on the track, if it be conceded that the conductor of the work-train could have his train standing beyond the limits prescribed by his orders, still it is for the jury to say, upon the evidence, whether it was negligence to be beyond those limits on the occasion of the accident, and whether or not such negligence if any, contributed to the accident.
4. NEW TRIAL—*Impeachment of Witnesses*.—As a general rule, subject to rare exceptions, a new trial will not be granted where the sole object is to discredit an adverse witness.
5. VERDICTS—*Conflicting Evidence—Weight of Evidence—Negligence*.—Where the evidence is conflicting as to the negligence of the de-

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fendant, or the contributory negligence of the plaintiff, the verdict of the jury will not be disturbed unless palpably erroneous. Nor will this court undertake to pass on the weight of evidence, or the credibility of witnesses. This is the province of the jury which the court will not usurp.

Error to a judgment of the Corporation Court of the city of Roanoke, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Wm. Gordon Robertson, for the plaintiff in error.

Smith & King, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This writ of error brings before us for review the record of an action at law, brought by the defendant in error to recover damages of the plaintiff in error for the alleged negligent killing of the plaintiff's intestate in a collision between two trains of the defendant company.

The collision occurred at a point on the Roanoke & Southern branch of the Norfolk and Western Railway, about three miles south of Starkey station, and near to bridge 1813, between a freight train, with two engines, fifty-two cars and a caboose, which was travelling north, and a work-train, which was standing still headed south. Arthur T. Spencer, the plaintiff's intestate, was the engineer on the front engine of the double-header, which was derailed at a point near the south end of the bridge and went down the bank, inflicting injuries from which Spencer died three days later.

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The trial, which was in the Corporation Court for the city of Roanoke, resulted in a verdict and judgment in favor of Spencer's administratrix for \$10,000.

The first bill of exception is to the action of the Corporation Court in admitting the evidence of W. S. McClanahan, who was introduced to show, by standard tables of mortality, what was the probable expectancy of life of a man twenty-six years of age. In the argument here this exception was properly abandoned. *Va. & S. W. Ry. Co. v. Bailey*, 103 Va. 205, 49 S. E. 33-37.

The second bill of exceptions is to the court's action in giving the four instructions asked for by the plaintiff. The learned counsel for the defendant company has at this bar withdrawn his objection to instructions Nos. 1 and 3. It will be, therefore, only necessary to refer to Nos. 2 and 4.

Instruction No. 2 is as follows: "The court instructs the jury that although the plaintiff's intestate may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet, if the defendant or engineman of the work-train could, in the result, by the exercise of ordinary care and diligence, have avoided the accident which happened, then plaintiff's intestate's negligence will not excuse the defendant, and the plaintiff is entitled to recover."

This instruction follows substantially the form that has been employed since the doctrine contained therein was first announced by this court. *Richmond & D. R. Co. v. Anderson*, 31 Gratt. 812, 31 Am. Rep. 760; *Johnson v. C. & O. Ry. Co.* 91 Va. 176, 21 S. E. 238; *Seaboard & Roanoke R. Co. v. Joyner*, 92 Va. 354, 23 S. E. 773; *Washington, &c. R. Co. v. Lacey*, 94 Va. 460-476, 26 S. E. 834.

This instruction is further objected to upon the ground that there was no evidence upon which to base it. This position is not tenable. The work-train was standing in a cut, about

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225 feet south of bridge 1813, when the engineer in charge called in his flagman. The evidence tends to show that when the flagman in response to the call, reached the engine of the work-train, he "hollered" to the engineer and said, "For God's sake, get out of here, there is a train coming down the mountain;" that the engineer did not move his engine, and the flagman made no effort to stop the coming train; that the engineer had time, after the warning given by the flagman, to have run his train back as far as the middle of the bridge, thus putting a distance of 332 feet between the two trains, with the view unobstructed, and both trains going in the same direction; and that if the engineer of the work-train had moved back promptly upon receiving notice of the coming freight train no collision could have occurred.

This evidence was sufficient to justify instruction No. 2, and the plaintiff was entitled to have that view of the case submitted to the jury.

Instruction No. 4 tells the jury, in substance, that if they believe from the evidence that the plaintiff's intestate received the injury complained of, in consequence of the negligence of the conductor, the engineer, or the flagman of the work-train, in not carrying out the rules and regulations of the defendant company, they must find for the plaintiff, unless the jury shall also believe from the evidence that the plaintiff's intestate was guilty of contributory negligence, and that the burden of proving such contributory negligence was upon the defendant.

It is contended that this instruction is erroneous because there is no evidence tending to connect either the conductor or the engineer of the work-train with the accident.

The evidence already adverted to in commenting upon instruction No. 2 is equally pertinent in connection with the objection urged to this instruction. In addition, there was

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other evidence which contributed to the basis for the instruction under consideration. The order which the conductor of the work-train received the morning of the day the accident occurred, gave him the right to work between Roanoke and bridge 1813.

At the time of the accident his train was 225 feet south of bridge 1813. He was, therefore, outside of his working limits.

Conceding that, if necessary, the conductor could have his work-train standing beyond the limits prescribed by the order, it was for the jury to say, under the evidence, whether it was negligence to be beyond those limits on this occasion, and whether or not such negligence, if any, contributed to the accident.

A careful examination of the record shows that there was sufficient evidence tending to show negligence on the part of each of the persons mentioned in instruction No. 4 to justify its being given.

The third and last bill of exception is to the action of the court in overruling the motion of the defendant company to set aside the verdict of the jury. Three grounds are alleged in support of this motion—(1) Misdirection of the jury (2) after-discovered evidence; and (3) that the verdict was contrary to the law and the evidence.

The first ground has been disposed of by what has been said in considering the objections to the instructions.

The second ground rests upon an affidavit of W. J. Knighton, the conductor of the work-train, as to a statement made to him by E. G. Haislip two or three days after the accident. E. G. Haislip was examined at the trial, on behalf of the plaintiff, and was followed immediately by W. J. Knighton, on behalf of the defendant company, who was called a second time to the stand after being fully examined, cross-examined, re-examined, and re-cross-examined, thus affording him ample opportunity to tell all that he knew about the case. His affidavit shows

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that the object of a new trial was that he might state that E. G. Haislip, a witness for the plaintiff, had, on one point, made to him a different statement from that made by this witness on the stand.

Without considering whether or not the additional evidence of Knighton, relied on as a ground for a new trial, is material and likely to produce a different result, or whether or not reasonable diligence would have secured such evidence at the trial now under review, it is sufficient to say that the general rule is, subject to rare exceptions, to refuse a new trial when the sole object is to discredit a witness on the opposite side. *Brugh v. Shanks*, 5 Leigh, 649; *Thompson v. Commonwealth*, 8 Gratt. 637; *Brown v. Speyers*, 20 Gratt. 296; *Reed's Case*, 22 Gratt. 924-946.

As already seen, the sole object of the motion for a new trial, on the ground of after-discovered evidence, was to discredit the testimony of the witness, E. G. Haislip, who had testified on the opposite side. In the light of the authorities cited, the after-discovered evidence relied on was insufficient to warrant a new trial.

The third ground upon which the motion to set aside the verdict rests, is, that the verdict was contrary to the law and the evidence.

At the time of the accident, the work-train was standing on a sharp curve in a deep cut a short distance south of a long trestle, called bridge 1813, so that it was out of view of the engineer of the freight train until he was in thirty feet of it.

Two work-trains were engaged between Roanoke and bridge 1813, under an order issued the day of the accident, which required them to protect themselves against each other and against all trains. For their protection each was furnished with two flagmen, one of whom was required to protect his train from trains approaching from the north, and the other

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against trains approaching from the south. Rule 399a of the defendant company, required the flagman to go three-fourths of a mile, or twenty-three telegraph poles from the work-train, and place one torpedo on the rail, on the engineer's side, and then go back at least seven telegraph poles farther, or one mile from his train, and place two torpedoes, on the same side, ten yards apart, and then return to the 23rd telegraph pole and remain there until called in by the whistle of his engine. The evidence tends to show that the flagman violated this rule and failed to put down the torpedoes necessary as a warning to the plaintiff's intestate. It also tends to show that the defendant was guilty of negligence in other particulars already adverted to in considering the instructions.

Whether or not the defendant company was guilty of negligence was a question of fact for the jury. Where the evidence is conflicting, as in this case, the verdict will not be disturbed unless palpably erroneous. *N. & W. Ry. Co. v. Perrow*, 101 Va. 345, 43 S. E. 614; *Morien v. N. & A. T. Co.*, 102 Va. 622, 46 S. E. 907.

Nor will this court undertake to pass upon the weight of the evidence or the credibility of the witnesses. This is the province of the jury which the court will not usurp. The jury should be left free in each case to determine, in view of all the circumstances, what witnesses, or what part of the evidence of any witness, they will credit. *N. & W. Ry. Co. v. Poole*, 100 Va. 148, 40 S. E. 627. If the evidence introduced on behalf of the plaintiff was believed by the jury, and that of the defendant disbelieved, we could not say that their verdict was palpably erroneous, or that it was not justified.

It is contended that the plaintiff's intestate was guilty of contributory negligence. This was also a question of fact for the jury, and was submitted to them under full instructions as to the law, given without objection, on behalf of the defen-

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dant company. The deceased was discharging his duties as a locomotive engineer under the following order, which is known in the record as the "slow order:" "To all concerned: Until further notice, all trains will reduce speed to six miles per hour, while passing over bridge 1813, Winston District."

The deceased is charged with violation of this order, which is the foundation for the charge of contributory negligence.

It is to be observed that the collision took place before the freight train reached the bridge mentioned in the order, but it is contended that the deceased was approaching the bridge at a rate of speed that would have prevented him from reducing it to six miles per hour while crossing the bridge. The evidence of the speed of the train is conflicting. One witness puts it at six miles an hour, another at eight, and still another at twenty miles per hour; and the evidence on that point tends to show that the speed could have been reduced to six miles an hour by the time the bridge was reached.

Under the evidence it is impossible to say that reasonable men might not differ in their judgment upon the question whether or not the plaintiff's intestate was guilty of negligence, and therefore this court would not be warranted in disturbing the verdict of the jury. *Southern Ry. Co. v. Aldridge*, 101 Va. 142-149, 43 S. E. 333.

For these reasons the judgment must be affirmed.

Affirmed.

Syllabus.

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NORFOLK & WESTERN RAILWAY COMPANY v. COFFEY.

December 7, 1905.

1. PLEADING—*Filing Pleas in Vacation—Notice to Counsel—Irregularities.*—After a case has been matured at rules and docketed, the court may permit additional pleas to be filed in term, but there is no statutory authority for permitting such pleadings to be filed in vacation. Such permission, however, is frequently granted by the trial courts and the practice is unobjectionable under proper limitations. Opposing counsel should always be given notice of the application to file such pleas and an opportunity to resist it, or else to procure supplemental leave to file other pleadings and make up the issue. At the succeeding term the court may correct any irregularities which have occurred.
2. PLEADING—*Failure to Reply—Rule—Non-Suit.*—If a plaintiff fails to reply to a plea within the time prescribed by law, or order of court, the defendant should apply for a rule to compel him to do so, or in default thereof to suffer a non-suit.
3. DEMURRER TO EVIDENCE—*No Issue—Surprise—Setting Aside the Demurrer—Control of Court.*—If, upon the argument of a demurrer to the evidence by a defendant, after the jury have rendered a conditional verdict, it is discovered for the first time that the plaintiff, by mistake, has failed to reply to one of the defendant's pleas setting up a material defense, and the court and the plaintiff are taken by surprise, it is the duty of the court of its own motion—the whole matter being *in fieri*,—to set aside the demurrer to the evidence and the award of damages thereon, and to cause the issue to be made up on such plea, and order a new trial of the case.
4. JEOPAILS—*Want of Issue Not Cured.*—In an action at law, the statute of jeopails does not cure the *non-joinder*, or want of issue altogether, and no verdict or judgment can properly be rendered therein.
5. MASTER AND SERVANT—*Negligence—Safe Place—Case at Bar.*—Upon the merits of the case, independently of the defense of the statute of limitations, which was withdrawn, it is held that the plaintiff in

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error was guilty of actionable negligence in failing to use ordinary care to keep its rock quarry in which the defendant in error was employed as laborer, in a reasonably safe condition, which negligence was the proximate and efficient cause of the injury complained of; and that this unsafe condition was not attributable to the work which was being done in the quarry, nor was the charge of contributory negligence on the part of the defendant in error sustained by the evidence.

Error to a judgment of the Circuit Court of Rockbridge county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

This was an action of trespass on the case to recover damages for an injury inflicted on the plaintiff while working as a laborer in a rock quarry of the defendant. It appears that the plaintiff, L. B. Coffey, who was a minor, was employed as a day laborer to work in defendant's rock quarry at Corwall, in Rockbridge county, Va. When we went to work in the quarry, he had had but little, if any, experience in such business. After he had been at work about three months, a stone, which had been loosened by alternate freezing and thawing, fell out of the side of the clift above the quarry, struck a rock and, glancing, hit him on the head, knocking him senseless and producing the injury complained of. Dangers of this nature had been observed by other quarry-men, who were men of experience in that kind of business, several days prior to the accident, and they had warned the foreman of it. The dangerous condition of the quarry could have been remedied, and the place rendered reasonably safe, by sending men up on the clift with ropes and picks and having the loose rock "clawed down." One quarry-man had been struck by a falling rock a short while before the accident now under investigation, and had reported it to the

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foreman, and requested him to "claw down" the side of the cliff above, but he delayed doing so until after the happening of the accident complained of. The plaintiff, owing to his inexperience, was ignorant of this dangerous condition, and did not know of the dangers to be encountered from the alternate freezing and thawing. Experienced workmen, however, did know of such dangers. In order to have rendered the quarry reasonably safe, this "clawing down" should have been done at least once a week, but was not done at all. The loosening of the rock was not the result of blasting or other work done in the quarry, but of the alternate thawing and freezing above mentioned.

E. Morgan Pendleton, Joseph I. Doran and Marshall McCormick, for the plaintiff in error.

Greenlee D. Letcher, for the defendant in error.

WHITTEL, J., delivered the opinion of the court.

The object of this action is to recover damages for personal injuries sustained by the defendant in error while at work as a laborer in the quarry of the plaintiff in error. A brief outline of the proceedings in the case is essential to an intelligent apprehension of the questions presented for decision.

After issue joined upon the plea of not guilty, the defendant obtained leave of the court to file pleas of the statute of limitations within fifteen days from the date of the order; and liberty was also granted the plaintiff to reply generally or specially to said pleas. Accordingly, the defendant, within the time prescribed by the order and during the vacation of the court, filed with the clerk two pleas of the statute of limitations, but no issue was taken upon them

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by the plaintiff. At a subsequent term, a jury was empaneled to try the issue joined; and, at the conclusion of the testimony, the defendant demurred to the evidence, in which demurrer the plaintiff joined. Whereupon the jury assessed the plaintiff's damages at \$2,000, subject to the opinion of the court on the demurrer to the evidence. During the progress of the trial the defendant introduced evidence tending to prove that more than twelve months had elapsed between the date at which the plaintiff attained his majority and the institution of the action; and upon the argument of the demurrer to the evidence it was insisted that the right of action was, therefore, barred by the statute of limitations. To repel that contention, counsel for the plaintiff presented an affidavit to the effect that he was ill at the time the defendant obtained permission to file the pleas in question, and knew nothing of the entry of the order or the filing of the pleas; that no record was made of the fact of such filing, either in the clerk's office or at the succeeding term of the court; that no rule was asked or awarded against the plaintiff, requiring him to reply to the pleas; and that no issue was ever joined upon them; that the existence of the pleas and the fact that the statute of limitations was relied on by the defendant, were for the first time made known to counsel on the argument of the demurrer to the evidence and operated a complete surprise; that the plaintiff was full-handed with proof to meet that defense, but had adduced no evidence on the subject, not conceiving the matter to be in issue upon the pleadings. Counsel also tendered replications to the pleas, and furthermore agreed that if the defendant would consent to file rejoinders to said replications, the verdict of the jury might be set aside, and the issue thus made submitted either

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in the court or jury for trial. But the defendant declined to accede to said proposal; and, thereupon, the court, disregarding the pleas, proceeded to overrule the demurrer to the evidence, and rendered judgment for the plaintiff.

It is alleged in support of that ruling, that the Court was without authority to permit the pleas to be filed in the first instance; and, in order to validate the proceeding, it was essential that the vacation filing should have been ratified, or at least recognized, by an order at the succeeding term.

It is true that after a case has been matured for trial at rules, and docketed, while the court has ample power to allow additional pleadings to be filed during the term, there is no statutory sanction for permitting such pleadings to be filed in vacation. Nevertheless, in conformity with a rule of practice which obtains throughout the State, such power is freely exercised by the trial courts in the practical administration of justice. Subject to proper limitation, the practice is not only unobjectionable, but tends to prevent surprise, and facilitates the preparation of cases for trial. Opposing counsel, however, ought always to be given notice of such application and opportunity to resist it; or else, if desired, to procure supplemental leave to file other pleadings and make up the issue. The court, at the next term, by analogy to the statutory control which it may exercise over all proceedings in the clerk's office during the preceding vacation (Va. Code, 1904, §3293), exerts similar supervisory control over vacation proceedings done by leave of court, to correct irregularities and prevent abuses. Thus guarded, the practice is salutary and ought not to be disturbed.

Where a plaintiff fails to reply to a plea within the time prescribed by law, or order of the court, the correct practice is for the defendant to apply for a rule to compel him to do so, or in default thereof to suffer a judgment of *non prosequitur*. 18 Ency. of Pl. & Pr., 650.

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That judgment is appropriate where the plaintiff, after appearance and before final judgment, fails to prosecute his action by neglecting to file his pleadings in due course. 4 Min. Inst. (3rd Ed.) Pt. I, p. 957; St. Pl. 136.

If that practice had been pursued by the defendant in the present instance, no doubt issue would have been joined on the pleas of the statute of limitations, and the dilemma which subsequently confronted the court would have been avoided.

It is, however, apparent that both court and counsel were taken by surprise at the reliance of the defendant on the statute of limitations; and it would have been manifestly improper, under the circumstances, to have sustained that defense. When attention was called to the matter, the whole proceeding upon the demurrer to the evidence was *in fieri*, and under the control of the court; and it appearing that by mistake the pleadings were in such condition that the merits of the case, upon a material ground of defense, could not be decided, the court ought, of its own motion, to have set aside the demurrer to the evidence and the award of damages thereon, and, having caused the issue to be made up on the pleas of the statute of limitations, ordered a new trial of the case. *Taliaferro v. Gatewood*, 6 Munf. 320; *Fairfax v. Lewis*, 11 Leigh 233; *Ins. Co. v. Wilson*, 29 W. Va., 528, 2 S. E. 888.

In an *action at law*, the statute of jeofails does not cure the *non joinder* or want of issue altogether, and no verdict or judgment can properly be rendered therein. The authorities on the subject will be found in a note to *Rowans v. Givens*, 10 Gratt. (Va. Rep. Anno.) 249.

Other grounds of error have been pressed, but inasmuch as for the reasons assigned, the judgment must be reversed and a new trial had, upon which the evidence may not be the same, it would not be proper to express any opinion in regard to them.

Opinion.

The judgment is reversed and the case remanded for further proceedings to be had therein not in conflict with this opinion.

BY THE COURT (on rehearing).

Upon the petitions of both the plaintiff in error and defendant in error to rehear the judgment of this court, rendered in this case on the 26th day of September, 1905, at its place of session in the city of Staunton, reversing the judgment of the Circuit court of Rockbridge county, and remanding the case to that court for further proceedings to be had therein not in conflict with the opinion of this court.

It appearing from said petitions that the plaintiff in error has expressly waived its pleas of the statute of limitations, and that both parties desire a final disposition of this case upon the merits as presented by the record, independently of the defense of the statute of limitations: On mature consideration thereof, the court is of opinion that the plaintiff in error was guilty of actionable negligence in failing to use ordinary care to keep its rock quarry, in which the defendant in error was employed as a laborer, in reasonably safe condition (and that said unsafe condition was not attributable to the work which was being conducted in said quarry), which negligence was the proximate and efficient cause of the injuries suffered by the defendant in error; and that the charge of contributory negligence alleged against the defendant in error is not sustained by the evidence; doth so decide and declare.

Therefore, (without in any manner receding from the views expressed by this court in its opinion delivered in the case, as originally submitted on the pleadings), upon the case as now

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presented by the record, with the pleas of the statute of limitations withdrawn, it is considered by the court that the order heretofore entered in the case be set aside, and that the judgment of the Circuit Court be affirmed.

And it is further considered by the court that the plaintiff in error pay to the defendant in error damages according to law, and also his costs by him about his defense herein expended.

Which is ordered to be entered in the order book here, and forthwith certified to the clerk of this court at Staunton, who will enter the same in the order book there and certify it to the said Circuit Court of Rockbridge county.

Affirmed.

Statement.

Richmond.

ROWLAND AND OTHERS V. ROWLAND AND OTHERS.

December 7, 1905.

1. **APPEAL AND ERROR—Who May Appeal—Interest.**—In order that an appeal may be successfully prosecuted, it must be shown that the appellant has been aggrieved. An infant legatee as to whom a will is declared valid, and whose legacy has been paid in full, has no interest in and cannot appeal from a decree declaring the will void as to all other parties.
2. **WILLS—Issue Devisavit vel non—Terms of Issue—Code, Sec. 2544.**—It was not intended by Code, Sec. 2544, to make hard and fast the exact terms in which an issue *devisavit vel non* should be framed. Where a will is assailed on the ground of incapacity of the testator to make a will and of fraud and undue influence exerted over him, and the issue tendered by the bill is accepted by the answer, and the will is assaulted and defended as a whole, and there is no suggestion from any source that the will may be valid in part and invalid as to other parts, in framing an issue under Code, Sec. 2544, it is sufficient to direct the jury to ascertain whether a given paper, purporting to be the last will and testament of the testator, is the true last will and testament of the testator. It is not necessary to go further and enquire whether any part of said paper is his will.

Appeal from a decree in chancery of the Circuit Court of Clarke county. The appellants filed a bill to review a former decree in a suit in chancery praying an issue *devisavit vel non*. The decree was adverse to appellants, all of whom but one were parties defendants. Thereupon they and one other filed a bill of review. Decree in favor of the defendants to the bill of review. The complainants in that bill appeal.

Affirmed.

Opinion.

The opinion states the case.

A. Moore, Jr., and Chas. M. Broun, for the appellants.

Marshall McCormick, for the appellees.

KEITH, P., delivered the opinion of the court.

A bill was filed in the Circuit Court of Clarke county by George W. Rowland and others, in which it is stated that Thomas J. Rowland, of Clarke county, died seised of a tract of land valued at about \$4,000, and that in addition thereto he left some personal property; that since he died a writing, purporting to be his last will and testament, has been admitted to probate in the County Court of that county, which, as plaintiffs allege, is not the true last will and testament of the decedent, who, as they charge, was incapable, by reason of physical and mental infirmity, of making a will, and because it was obtained by undue influence and fraud practiced by certain of the defendants.

The defendants, who were the beneficiaries under the will, answered, denying the allegations of the bill, and maintaining, on the contrary, that the said paper writing so admitted to probate "is the true last will and testament of Thomas J. Rowland, deceased, and that he was perfectly capable, both mentally and physically, of making a will."

Upon the pleadings an issue was awarded to ascertain "whether or not the paper, dated February 18, 1901, purporting to be the last will and testament of Thomas J. Rowland, is the true last will and testament of the said Thomas J. Rowland;" and it was provided further that "On the trial of this issue the propounders of the will shall be the plaintiffs, and contestants are defendants."

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A jury was impaneled on the common law side of the court which rendered a verdict as follows: "We, the jury, on the issues joined, find that the paper dated February 18, 1901, signed by Thomas J. Rowland, witnessed by Daniel Hefflebower and C. W. Conrad, and purporting to be the last will of said Thomas J. Rowland, is not the last will of said Thomas J. Rowland."

This verdict was certified to the court upon its chancery side, which received and approved it, and decreed accordingly; and the cause was retired from the docket.

On the 2nd of February following, John J. Rowland, Jennie Posten, and others, presented a bill of review, in which they set out the object of the original bill, the proceedings thereunder, and then allege that Abbie Posten was, at the time of the decree which they ask to be reviewed, and now is, an infant under the age of twenty-one years; and that while she was made a party to the original bill, no guardian *ad litem* was appointed or asked for as to her, and she is therefore advised that the proceedings in the said suit are, with respect to her, null and void.

The complainants in the bill of review assign also as error that the issue tried by the jury under the original bill is not the issue prescribed by the statute in such cases; that it was irregular, and that the verdict of the jury thereon is illegal because upon the issue as framed the jury were compelled to find for the will in its entirety, or against it in its entirety, while the issue prescribed by the statute is so phrased as to permit a jury upon the issue of *devisavit vel non* to sustain the instrument, submitted to it, in part and reject it in part.

Answering this bill, the defendants tendered and offered to bring into court the full amount of the bequest to Abbie Posten

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in the will under investigation, to be received in full discharge of the legacy to her. They denied that the issue directed by the decree of the February term, 1902, is not the issue prescribed by statute in such cases.

Upon the issue raised by the bill of review, the answer thereto, and the depositions of witnesses, the court entered a decree, denying the relief prayed for with respect to the adult defendants, and with respect to Abbie Posten the decree recites, that "the verdict of the jury as to her is set aside, by the consent of all of the other parties in interest, except the complainants in the bill of review. As to said infant defendant, it is by like consent, ordered that the will shall be established as to the infant defendant, and as to her legacy said decedent died testate, but this consent does not extend beyond her interest, and it is ordered as to all other parties in interest said decedent died intestate.

"In order that no one can be prejudiced by this decree, the defendants to the bill of review moved the court to permit them to pay one hundred dollars, the amount of the legacy left her by the will of the alleged testator, with interest thereon from the 8th day of August, 1901, into the hands of the general receiver, to be by him held until, in the proper course of administration, the same shall be disbursed by proper proceedings, which said motion the court granted. Thereupon the said defendants paid the said money to the general receiver. As to the decree for costs the said Abbey Posten by like consent is relieved and released from the payment of all costs, either in the original proceeding or in this proceeding had upon the bills of review. In all other respects the final decree in this cause, sought to be reviewed, is approved and confirmed."

In order that an appeal may be successfully prosecuted, it

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must be shown that the appellant has been aggrieved. It is manifest that Abbie Posten is in no respect interested in the case before us. A reversal of the decree would give her nothing more than that which she receives under the decree.

The remaining question to be considered is as to the form of the issue submitted to the jury.

By section 2544 of the Code it is provided, that "After a sentence or order under this section, a person interested, who was not a party to the proceeding, may, within two years, proceed by bill in equity to impeach or establish the will, on which bill a trial by a jury shall be ordered, to ascertain whether any, and if any, how much of what was so offered for probate, be the will of the decedent."

The statute does not undertake to prescribe the terms of the issue. It states the object in view in the framing of the issue, which is to ascertain whether any, and if any how much, of what was offered for probate is the will of the decedent; but it was not intended to make hard and fast the exact terms in which the issue should be framed. A substantial compliance with the statute, looking to the object to be accomplished, is sufficient.

The bill in this case attacks the will as a whole. It states a case which, if true, avoids the whole and every part of the paper which had been probated as the will of the decedent. The answer accepts the issue thus tendered, and undertakes to maintain the will in its entirety. There is no suggestion in bill or answer, or in the evidence adduced, that a part of the paper may be established as a will and the residue rejected as having been obtained by fraud or undue influence. The issue was framed by the court precisely as it was tendered by the plaintiffs and accepted by the defendants, and it is manifest that it did not, and could not have operated to the prejudice of appellants.

Opinion.

We are of opinion that the decree complained of should be affirmed.

Affirmed.

Opinion.

Richmond.

NORFOLK RAILWAY AND LIGHT COMPANY V. WILLIAR.

December 14, 1905.

1. MARRIED WOMAN'S ACT—*Services of Wife—Personal Injury of Wife.*—

Notwithstanding the comprehensive provisions of the present Married Woman's Act in this State (Acts, 1899-1900, p. 1240), the husband is still entitled to the services of his wife, and, in an action by her to recover damages for injury inflicted upon her, where the only testimony as to the diminution of her ability to perform her ordinary duties related to her impaired capacity for attending to her household duties, it is error to instruct the jury that, in assessing the damages, they may take into consideration the diminution, if any, of her physical ability to perform the ordinary duties of life, as the language of the instruction covers damages for which the husband alone can recover.

Error to a judgment of the Law and Chancery Court of the city of Norfolk, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

White, Tunstall & Thom, for the plaintiff in error.

R. B. Tibbett and Brooke & Elliott, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This action was instituted by Margie E. Williar, a married woman, to recover damages for personal injuries caused, as alleged, by a collision between two cars of the plaintiff in error, in one of which she was a passenger.

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The declaration charges that by said collision, without contributing thereto by any act or neglect on her part, and as the direct result thereof, she was badly bruised, etc., and suffered therefrom great nervous shock, physical pain and anguish of mind, and as the direct result thereof she had become permanently disabled and a helpless invalid.

The trial resulted in a verdict in favor of the plaintiff for \$4,500, which the Court of Law and Chancery of the city of Norfolk refused to set aside, and entered thereon the judgment to which this writ of error was awarded.

The first assignment of error is to the action of the court in giving for the plaintiff the following instruction:

"The court instructs the jury that if they find for the plaintiff, they may, in assessing damages, take into consideration her physical and mental suffering, if any, arising from said injury; the diminution, if any, of her physical ability to perform the ordinary duties of her life, caused by said injury, and whether her said injuries are of a permanent or temporary character."

This court has held that, notwithstanding the provisions of chapter 103 of the Code, the husband is entitled to the services of his wife. *Richmond, &c., Co., v. Bowles*, 92 Va. 738, 24 S. E. 388; *A. & D. R. Co. v. Ironmonger*, 95 Va. 625, 29 S. E. 319. These cases dealt with the law touching married women and their estates as it was under chapter 103 of the Code. We now have a new married women's act. See Acts, 1899-1900, p. 1240. A careful reading of this later act, however, discloses no ground affecting the view taken by this court in the cases cited. The new act is no broader than the prior law, and under it, therefore, the husband is still entitled to the services of his wife.

This being so, we are of opinion that it was error to instruct the jury that in assessing damages they could take into con-

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sideration the diminution, if any, of the plaintiff's physical ability to perform the ordinary duties of her life, for the reason that "the ordinary duties of her life" embrace elements of damage which would be properly recoverable by the husband, and which constitute no part of the wife's separate estate.

Granting it to be true, as contended, that the ordinary duties of a married woman's life include duties in which she has a personal interest, separate and apart from her husband's right to her services, still the language also includes, as already said, those duties the performance of which constitute services belonging to the husband, and which he alone had the right to recover. The only testimony as to a diminution in her ability to perform her ordinary duties related to her impaired capacity for attending to her household duties, and as to these her husband was entitled to her services. The instruction made no discrimination, but included all the ordinary duties of life, and therefore, it was equivalent to telling the jury that they could find in a case brought by her alone, damages for that for which the husband alone could recover.

As said in a New York case, damages for the injury to her person belong to her, because the statute has given them to her, but damages for the loss of her services belong to her husband because the common law gave them to him, and the statute has not taken them away. *Blacchinska v. Home for Little Wanderers*, 130 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215.

The action of the court in refusing to give the following instruction asked for by the defendant company, is also assigned as error:

"The court instructs the jury that if they believe from the evidence that prior to the date of the alleged accident, namely, the fourth day of December, 1902, the plaintiff had *pseudo angina pectoris*, or any nervous disorder, then she cannot re-

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cover under the declaration and proofs in this cause on account of such *pseudo angina pectoris*, or other nervous disorder existing before said accident, or any aggravation thereof produced by said accident."

It is contended that the declaration and the proof adduced in its support were expressly based upon the theory that the plaintiff, before the accident, was well, hearty and healthy, and had no *pseudo angina pectoris*, nor any nervous disorder, but that those troubles had been produced by the accident and were the direct result of it, and, therefore, that the refusal to give this instruction was a refusal to tell the jury that the plaintiff was to be restrained by the case she had claimed and attempted to sustain, and could not recover upon another and different case. It is further insisted that there can, as stated in the instruction, be no recovery for the aggravation of an existing disease where the declaration is framed upon the theory that the particular disease was produced by the injuries, and not merely aggravated thereby.

For the error already pointed out the case will have to be remanded for a new trial, and therefore we forbear to express an opinion upon this last mentioned assignment of error, for the reason that the plaintiff will, before another trial, have an opportunity to amend her declaration and thus avoid the difficulty suggested by the court's refusal to give the instruction under consideration.

The judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

Syllabus.

Richmond.

STANDARD OIL COMPANY V. COMMONWEALTH
AND
AMERICAN CAN COMPANY V. COMMONWEALTH.

December 14, 1905.

1. **FOREIGN CORPORATIONS—*Exclusion from State.***—A State has unlimited power to prescribe the terms and conditions upon which foreign corporations may do business within its limits, and may, if it chooses, exclude them altogether.
2. **FOREIGN CORPORATIONS—*Public Service Corporations—Fees to State—Revenue Laws—Construction.***—The fee prescribed by statute to be paid by every foreign corporation authorized by its charter to exercise the powers of a transportation or transmission company as a prerequisite to its right "to do business in this State" must be exacted of every such corporation before it can do *any* business in this State, whether that of a public service corporation or not. If the character of the foreign corporation confers upon it the right to exercise the powers of a transportation or transmission company, it is within the language of the statute and must pay the fee, although it has never exercised such power in any State, and does not ask to exercise it in this State, and the Legislature of this State is forbidden by the Constitution to confer such power. The test of liability for the fee is not whether the corporation can or intends to carry on the business of a public service corporation, but whether its charter authorizes it to carry on that business. If so authorized, then it belongs to the class upon which the Legislature has laid the burden, and the fee must be paid. *Keith, P., and Cardwell, J., dissenting.*
3. **TAXATION—*Validity of Tax—Construction—As between State and Foreign Corporations.***—The rule that doubts as to the validity of a tax are to be resolved in favor of the citizen has no application to the case of a foreign corporation asking for the privilege of doing business in this State.
4. **STATE CORPORATION COMMISSION—*Action Presumed to be Right.***—

Opinion.

The action of the State Corporation Commission in imposing a fee or tax on a foreign corporation seeking to do business in this State is to be regarded as *prima facie* correct, as in other cases. Constitution, Sec. 156, cl. (f).

Appeal from the State Corporation Commission.

Affirmed.

The opinion states the case.

Christain & Christain, for the appellants.

Attorney-General Wm. A. Anderson, for the Commonwealth.

HARRISON, J., delivered the opinion of the court.

This is an appeal from a judgment of the State Corporation Commission, imposing a fine of ten dollars and cost, under section 1105 of the Code, as amended by the act of May 15, 1903, upon the Standard Oil Company for the alleged offense of transacting business within the State of Virginia without having first obtained from the Corporation Commission the certificate of authority required by law.

It appears from the record that the Standard Oil Company is a foreign corporation, created and organized under the laws of New Jersey, with an authorized capital stock of one hundred and ten million dollars. It further appears that the appellant company is authorized by its charter to exercise some of the franchises and powers of a public service corporation.

The solution of the present controversy involves a construction of section 37 of the revenue law of Virginia, (Code, 1904, p. 2214) which provides as follows: "Every domestic corporation authorized by its charter to exercise the powers of a transportation or transmission company, or to own, lease, construct, maintain and operate a public service line or road of any kind,

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upon the granting or extension of its charter, and every foreign corporation authorized by its charter to exercise the powers of a transportation or transmission company, or to own, lease, construct, maintain and operate a public service line or road of any kind, when it obtains from the State Corporation Commission a certificate of authority to do business in this State, shall pay a fee into the treasury of the State of Virginia to be ascertained and fixed as follows:" Then follows a table of the fees to be paid, graded according to the maximum capital stock authorized by the terms of the charter.

According to this table, the fee for the appellant company, having a maximum authorized capital of \$110,000,000, is fixed at \$5,000.

It will not be denied that a State has unlimited power in the matter of prescribing the terms and conditions upon which a foreign corporation shall be permitted to do business within her limits, and that, if she chooses, such corporations can be excluded entirely. *Bank of Augusta v. Earle*, 13 Peters 519, 10 L. Ed. 274; *Lafayette Insurance Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Lucat v. Chicago*, 10 Wall. 410, 19 L. Ed. 972. Therefore, the sole question to be determined in this case is what are the terms and conditions upon which the appellant corporation is permitted to do business in this State?

These are prescribed by section 37 of the revenue law as follows: "Every foreign corporation authorized by its charter to exercise the powers of a transportation or transmission company, etc., when it obtains from the State Corporation Commission a certificate of authority to do business in this State, shall pay a fee into the treasury of the State of Virginia to be ascertained and fixed as follows:"

It is clear from this language that a foreign corporation which is authorized by its charter to do the business of a public service

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corporation must, in order to carry on business *of any kind* in this State, obtain from the State Corporation Commission a certificate of authority to do such business, and pay into the State treasury the fee prescribed for such certificate; the test of its liability for such fee being, not whether it can or intends to carry on the business of a public service corporation, but whether its charter authorizes it to carry on that business. No matter which of the numerous businesses authorized by its charter it may be carrying on or proposing to conduct in Virginia, if it is authorized by its charter to carry on the business of a public service corporation, her condition is that the fee prescribed by the section mentioned shall be paid into her treasury.

It is insisted on behalf of the appellant company, that the language of section 37 of the revenue law, "to do business in this State," has reference only to doing the business of a public service corporation; that if appellant was asking for authority to carry on the business of a public service corporation, it would be liable for the fee imposed by section 37, because it is "the business in this State" which is contemplated to be done, or possible for the corporation to do, for which the "certificate of authority" is issued and the fee "ascertained and fixed;" that, inasmuch as appellant cannot carry on the business of a public service corporation in Virginia, by reason of the inhibition of section 163 of her Constitution, therefore it follows that the Corporation Commission could not have granted it authority to exercise any such powers; that it never could have been the intention of the Legislature of the State to tax the petitioner on a business which it did not ask the privilege of doing, and which the Legislature could not empower it to carry on in the State.

The object of this revenue law was not in our opinion, to confer upon foreign corporations authority to exercise any par-

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ticular power granted by their respective charters. The language of section 37 was employed as a means of designating and classifying certain foreign corporations, and fixing the rate of fee that should be paid by such corporations for the certificate of authority to carry on *any business* in Virginia. The intent of the statute is that corporations, whether created under the laws of Virginia, or coming into the State as foreign corporations, having under their charters extensive powers in connection with the operation of transportation and transmission companies, shall pay a larger fee than ordinary industrial companies. The Legislature might well have enacted that a foreign corporation having powers of this character in its charter, should be required to pay more than one not having such powers, although these powers could be exercised in some other State or States but not in Virginia.

Giving the language of section 37 its literal and natural interpretation, it seems plain that the fee prescribed had no relation or reference to the character or the amount of business to be transacted by the foreign corporation in this State, but was ascertained and determined first by the character of the chartered powers of the corporation in the State of its domicil, and second, by the maximum amount of its authorized capital. The fact that a foreign company possessed, among others, the great powers of a public service corporation was doubtless regarded by the Legislature as sufficient evidence of its capacity and importance as a business enterprise, no matter what business it might conduct, to justify its being placed in a higher class than its less pretentious neighbors.

Whether the criterion adopted be arbitrary or not, it is a method of determining the fee to be paid which the General Assembly chose to adopt, and had the right to prescribe.

Nor did the business to be carried on by the foreign corpora-

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tion in this State have any bearing upon the question, whether a particular corporation was embraced within the class of corporations mentioned in section 37. That question was to be determined solely by the inquiry, whether such corporation had, by virtue of its charter, the powers of a public service corporation. If it had those powers, then it belonged to the class, and came within the terms of section 37, and must pay the fee there prescribed.

It is further contended that appellant belongs to the class of corporations named in section 38 of the revenue law, and, therefore, is only liable to pay a fee of \$600, as prescribed by that section.

It is only necessary to say, that appellant being, as we have held, *included* in the class designated by section 37, it is by the express terms of section 38, excluded from that class of corporations there referred to; the language of section 38 being, that every foreign corporation *other* than such as are described in the last preceding section (37) shall pay, etc. .

It is suggested that in case of doubt as to the validity of a tax, the doubt should be solved in favor of the citizen. We recognize the soundness of this principle when applied to the State and her citizens; but it has, we think, no application to this case where the party complaining is not a citizen of Virginia but a foreign corporation, merely asking for the privilege of doing business in this State. We have, however, no doubt of the correctness of the construction placed upon section 37 by the State Corporation Commission. If we entertained doubt merely, our hesitation would have to be solved in favor of the State, as the Constitution requires us to regard the action of the Corporation Commission as *prima facie* correct. Const., sec. 156, cl. f.

For these reasons, the judgment complained of must be affirmed.

Dissenting Opinion.

In the case of the *American Can Company v. Commonwealth*, HARRISON, J., speaking for the Court, said:

This appeal from the State Corporation Commission involves the precise question decided to-day in the case of *Standard Oil Company v. Commonwealth*, and for the reasons there given and filed with the record, the judgment here complained of must be affirmed.

KEITH, P. (dissenting):

I am unable to agree with the view expressed by the court, and deem the question involved of sufficient interest to justify me in filing a dissenting opinion.

As the two cases are identical, I shall refer only to the case of the Standard Oil Company.

This is a corporation chartered under the laws of the State of New Jersey, which has very varied and extensive privileges. It appears that by its charter it is authorized to exercise the powers of what is known in the laws of this State as a public service corporation. It further appears, however, that it has not, either in this State or elsewhere, exercised such powers, and the question for consideration is, whether it is taxable as a public service corporation, or whether it is taxable under another section of the statute and liable to the payment of a less fee for the exercise of such business as it is actually engaged in within the limits of the State of Virginia.

Section 37 of the revenue law of the State (Code, 1904, p. 2214,) is as follows: "Every domestic corporation authorized by its charter to exercise the powers of a transportation or transmission company, or to own, lease, construct, maintain and operate a public service line or road of any kind, upon the granting or extension of its charter, and every foreign corporation authorized by its charter to exercise the powers of a trans-

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portation or transmission company, or to own, lease, construct, maintain and operate a public service line or road of any kind, when it obtains from the State Corporation Commission a certificate of authority to do business in this State, shall pay a fee into the treasury of the State of Virginia, to be ascertained and fixed as follows:" Then follows a table fixing the fee in each case according to the maximum capital authorized, and according to which table the fee to be paid by the Standard Oil Co. would be five thousand dollars.

By section 38 of the revenue law, (Code, 1904, p. 2215) it is provided that "Every domestic corporation, other than such as are described in the last preceding section, upon the granting or extension of its charter, and every foreign corporation, other than such as are described in the last preceding section, when it obtains from the State Corporation Commission a certificate of authority to do business in this State, shall pay a fee into the treasury of the State of Virginia, to be ascertained and fixed as follows:" Then follows a table fixing these fees, which would make the tax on the Standard Oil Company six hundred dollars, which amount has already been paid into the treasury of the State.

By section 163 of the Constitution of the State, it is provided, that "No foreign corporation shall be authorized to carry on in this State the business, or to exercise any of the powers or franchises of a public service corporation, or be permitted to do anything which domestic corporations are prohibited from doing, or be relieved from compliance with any of the requirements made of similar domestic corporations by the Constitution and laws of this State where the same can be made applicable to such foreign corporation without discriminating against it. But this section shall not affect any public service corporation whose line or route extends across the boundary of

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this Commonwealth, nor prevent any foreign corporation from continuing any such lawful business as it may be engaged in in this State when this Constitution goes into effect. But any such foreign public service corporation so engaged shall not, without first becoming incorporated under the laws of this State, be authorized to acquire, lease, use or operate within this State any public or municipal franchise or franchises in addition to such as it may own, lease, use or operate when this Constitution goes into effect."

The contention on the part of the Commonwealth is that the Standard Oil Company is within the letter of section 37, which imposes a fee upon every foreign corporation authorized by its charter to exercise the powers of a transportation or transmission company; that these words are descriptive of a class upon which the higher rate of fee, or taxation (by whichever term it may be called), is to be imposed; that inasmuch as the Standard Oil Company is, by its charter, authorized to exercise the powers of a transportation or transmission company, it is taxable as such, though it is conceded that it has never exercised, and that by section 163 of the Constitution, which has been quoted, it is prohibited from exercising any such powers.

To me it seems plain, that to adopt this construction is, with all respect to the majority of the court, to "stick in the bark;" that the section is to be read as a whole, and not in disjointed parts; and that the language relied upon to justify the imposition of the fee which has been demanded is qualified by that which follows, to-wit: that "when it obtains from the State Corporation Commission a certificate of authority to do business in this State, shall pay a fee into the treasury of the State of Virginia, to be ascertained and fixed as follows:"

It is inconceivable to me that the State of Virginia is to be put in the attitude of exacting a fee for "a certificate of author-

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ity to do business in this State," when by the terms of its own organic law it has solemnly declared that "No foreign corporation shall be authorized to carry on in this State the business, or to exercise any of the powers or franchises of a public service corporation," unless it comes within the exceptions to section 163 of the Constitution, which it is not pretended is the case here.

But it is said, that unless the effect attributed by the opinion of the court to this section be the true one, the language of the act, which imposes a tax upon every foreign corporation authorized by its charter to exercise the powers of a transportation or transmission company, would be inoperative; but that I apprehend not to be the case. There are foreign corporations, authorized to carry on the business of public service corporations in this State, which are liable to the payment of the fees prescribed by section 37, because they come within that clause of section 163 of the Constitution, which provides that "this section shall not affect any public service corporation whose line or route extends across the boundary of this Commonwealth, nor prevent any foreign corporation from continuing any such lawful business as it may be engaged in in this State when this Constitution goes into effect." To illustrate—the Baltimore and Ohio Railroad Company, and the Louisville and Nashville Railroad Company, could with propriety be assessed under section 37 of the law.

The Standard Oil Company not having been engaged, either before or since the adoption of the Constitution, in the business of a public service corporation within this State, will not be allowed, under section 163 of the Constitution, to do such business, unless it goes before the State Corporation Commission and becomes incorporated under the laws of this State, and such a charter having been granted constitutes it a domestic

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corporation, and it would, of course, be entitled to exercise all the powers and functions conferred by its charter, including those of a public service corporation, and would then be within the terms of section 37, and be properly charged with the fees which its prescribes.

It is not contemplated by the law that this extraordinary fee under section 37 shall be levied but once; having been once levied and paid the law with respect to the corporation so paying it is satisfied. But if, under the view of the law presented by the majority opinion, the Standard Oil Company be required to pay a fee under section 37 in order to obtain a certificate of authority to do business in this State, it will be prohibited by the Constitution from doing the very business upon the basis of which the fee is charged; and, if it should then come forward and ask to have issued to it a domestic charter, would come squarely within the terms of section 37 and be required to pay the fee a second time.

It is axiomatic that before an imposition by the government can be enforced upon the citizen, the will of the sovereign which imposes the burden must be clearly and exactly declared. It has been said, that in such a case to doubt is to deny the authority, and it does seem to me that if the construction of the majority of the court is what was intended by the Legislature, it should have been clothed in less ambiguous terms.

CARDWELL, J., concurs with KEITH, P.

Affirmed.

Syllabus.

Richmond.FOREMAN, FOR, ETC., v. THE GERMAN ALLIANCE INSURANCE
ASSOCIATION.

December 14, 1905.

1. **INSURANCE—Payment of Premium—Evidence.**—Where it is material to prove the date at which an insurance premium was paid, and the same person was agent of both insurer and insured, and as agent of the latter advanced the premium on a policy, a receipt subsequently given by the agent to the assured for the amount so advanced which does not purport to have been given by him in his capacity as agent of the insurer and which is shown by the agent not to have been so given, but for money advanced by him, cannot be given in evidence in an action on the policy.
2. **INSURANCE—Forfeiture of Policy—Subsequent Acts and Declarations—Estoppel.**—Any acts, declarations or course of dealing by an insurance company, with knowledge of facts constituting a breach of a condition in a policy, leading the insured honestly to think that by conforming to the terms of the policy a forfeiture thereof will not be incurred, followed by due conformity on his part, will estop the insurance company from insisting upon the forfeiture, though it might be claimed under the express letter of the policy.
3. **PRINCIPAL AND AGENT—Common Agent of Two Principals—Imputed Knowledge—Burden of Proof.**—Where a waiver is sought to be established in consequence of the imputed knowledge of an agent, and the same person is agent for two principals, knowledge acquired by him while acting as the agent of one, in order to be binding on the other, must have been present in the agent's mind at the time he did the act which it is claimed constituted a waiver by such other, and the burden is on the party relying upon the waiver to prove this. The proof, however, may consist of circumstances as well as direct evidence.

Opinion.

4. **INSURANCE—Policy—Breach of Condition—Waiver—Estoppel.**—Mere knowledge by an insurance company of the existence of a breach of the contract of insurance does not of itself amount to a waiver, or an estoppel. There must exist, in addition to such knowledge, some positive act of confirmation, upon which, in connection with such knowledge, a waiver may be predicated, and by force of which the broken contract may be said to be revived.

Error to a judgment of the Law and Chancery Court of the city of Norfolk, in an action of *assumpsit*. Judgment for the defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Robert W. Matlett, for the plaintiff in error.

White, Tunstall & Thom, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This was an action of *assumpsit* instituted against the German Alliance Insurance Association, on a fire insurance policy, by C. B. Foreman, for the benefit of the Prudential Building and Loan Association.

The defense of the insurance company was that the premises, after the policy had been issued, became and remained vacant, in violation of that condition of the policy which declared that the entire policy shall be void if the building therein described be or become vacant or unoccupied for ten days.

The plaintiff admitted such vacancy, but claimed that the forfeiture resulting therefrom had been waived by the insurance company.

Upon the trial of the cause, the defendant, without introducing any evidence, demurred to the plaintiff's evidence. The court sustained the demurrer, and gave judgment for the defendant. To that judgment this writ of error was awarded.

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It appears that the policy, which was for one year, was issued on or about the 8th of May, 1902, through Albert Morris & Co., the general agents of the insurance company in the city of Norfolk. A like policy had been taken out by the insured for the previous year, but upon his informing the Building and Loan Association, which had a mortgage upon the property, that he could not pay the premium upon a policy for another year that association took out the policy sued on in his name, with a provision that the loss, if any, should be payable to the Building and Loan Association as its interest might appear. Albert Morris & Co. were also agents in that city for the Prudential Building & Loan Association, and were authorized to pay the premiums on policies of insurance in which it was interested, when such premiums fell due and were not paid, and could not be collected by them from the insured. The premium on the policy sued on not having been paid by the insured, Albert Morris & Co. paid it to the insurance company on the 5th of June.

On the 5th of July the insured vacated the premises, and between that time and the 10th of that month gave the key of the house to Albert Morris & Co., as the agents of the Prudential Building and Loan Association, informing them that he could not keep up the payments due the Building & Loan Association on its loan secured upon the property. Albert Morris & Co. about two weeks after that, notified him that if he did not pay the premium they would have to collect it from the Building & Loan Association. The insured did not pay them, nor did he know at that time that they had paid the premium to the insurance company under their agreement with the Building and Loan Association. Between that time and the following October, that association settled with or repaid Albert Morris & Co. the amount which they had advanced in paying the premium on the policy.

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In November of that year, the buildings on the premises were destroyed by fire. When the insurance company was notified of the loss, it at once denied its liability on the ground that the vacancy clause in the policy had been violated.

During the trial the plaintiff offered to read to the jury a receipt dated in October, 1902, given to the Building & Loan Association by Albert Morris & Co., for \$83.00, the aggregate amount of the premiums on eight insurance policies, one of which was the premium on the policy sued on. The receipt was objected to on the ground that it did not purport to have been given by Albert Morris & Co. as agents of the insurance company. The court sustained the objection and refused to allow the receipt to be read in evidence. That action of the court is assigned as error.

The receipt not only did not show upon its face that it was given by Albert Morris & Co. as the agents of the insurance company, but it appeared from the evidence of Albert Morris, who executed the receipt for his firm and proved their signature thereto, that the receipt was given by his firm not as the agents of the insurance company, but for insurance premiums which they had paid or advanced for the Building & Loan Association under its agreement with them, on policies in which it was interested. This being so, the court was clearly right in not admitting the receipt in evidence.

The next question to be determined is, has the plaintiff shown that the forfeiture was waived?

It is well settled that any acts, declarations or course of dealing by an insurance company, with knowledge of facts constituting a breach of a condition in the policy, leading the party insured honestly to think that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the insurance company from insisting upon the forfeiture, though it might be claimed under the express letter of the policy. *Georgia Home Ins. Co. v. Goode*, 28 Gratt. 88; *Morotock Ins. Co. v. Pankey*, 91 Va.

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259-60, 21 S. E. 487; *Va. Fire, &c., Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 433, 46 S. E. 463, 102 Am. St. Rep. 846, and cases there cited; *Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841.

Applying that principle to the facts of this case, it is manifest, we think, that the plaintiff in error has failed to show that the insurance company has waived or estopped itself from relying upon the forfeiture set up as a defense. The premium was paid on June 5, and the building did not become vacant until July 5, and there is no evidence that the insurance company knew that it became vacant before the fire occurred.

It is argued that its agents, Albert Morris & Co., knew that it was vacant, and that their knowledge was notice to the insurance company. It is true that Albert Morris & Co. did know it, but that knowledge was acquired by them as agents of the Building and Loan Association, and not while attending to the affairs of the insurance company. Knowledge acquired in that manner, in order to be binding upon the insurance company, would have to be present in the agent's mind at the time he did the act which it is claimed constituted the waiver, and the burden is on the party relying upon the waiver to prove this. That such knowledge was in the agent's mind may be shown by circumstances as well as by direct evidence. *Morrison v. Bausemer*, 32 Gratt. 225; *Johnson, &c., v. Natl. Ex. Bk.*, 33 Gratt. 473, 486-7; 2 Minors. Inst. (4th Ed.) 980; 1 Joyce on Ins., sec. 544; Mechem on Agency, sec. 721; *Martin v. South Salem L. Co.*, 94 Va. 28, 26 S. E. 591.

But even if the knowledge of Albert Morris & Co. was the knowledge of the insurance company, it did no act afterwards to the prejudice of the insured, or the beneficiary in the policy, or which can be held to have been a waiver of the forfeiture. If the insured, when called upon by Albert Morris & Co. to pay the amount of the premium two weeks after the house had been vacated, had paid that sum to them as premium on the policy, believing that they were collecting it as the agents of the in-

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insurance company, then he might have had the right to rely upon that as a waiver of the forfeiture; but he did not pay it, or pay any attention to their request. Neither did the insurance company, or its agents, Albert Morris & Co., do any act or make any declaration or pursue any course of conduct which gave the Building and Loan Association the right to believe that the forfeiture was or would be waived. The evidence clearly shows that when that association paid Albert Morris & Co. the amount of the premium, it paid it not as a premium due the insurance company, but as a debt due from it to Albert Morris & Co. as its own agents, for money advanced by them to pay the premium before the building had become vacant or the forfeiture had been incurred.

Mere knowledge by the insurance company of the existence of the breach of the contract does not of itself amount to a waiver or an estoppel. There must exist, in addition to a knowledge of the breach, some positive act of confirmation upon which in connection with the knowledge a waiver may be predicated, and by force of which the broken contract may be said to be revived. *Richards on Ins.*, §§ 78, 79; 2 *May on Ins.*, sec. 507; *Vance on Ins.*, p. 374; *Gibson, &c., v. Liverpool, &c., Ins. Co.*, 159 N. Y., 418, 426-27, 54 N. E. 23.

Having reached the conclusion that the acts and conduct of the agents of the insurance company, conceding that they were binding upon it, were not sufficient to establish a waiver of the forfeiture, or to estop the insurance company from setting it up as a defense, it will be unnecessary to consider the effect of that provision in the policy which declares that no officer, agent, or representative of the company shall have the power or be deemed or held to have waived any condition of the policy unless such waiver shall be written upon or attached to it.

We are of opinion that there is no error in the judgment of the Court of Law and Chancery, and that it must be affirmed.

Affirmed.

Statement.

Richmond.

ACKISS' EXECUTORS v. SATCHELL & OTHERS.

December 14, 1905.

1. **LIMITATION OF ACTIONS—*Judgments—Claim of Homestead—Suspension of Act.***—The prohibition to the enforcement of a judgment against property set apart as a homestead does not suspend the running of the statute of limitations as to the judgment. After the lapse of twenty years from the return day of an execution upon which there is a return by an officer, without a *scire facias* or action brought thereon in the meantime, the judgment is barred by limitation, and the lien, which is a mere incident of the judgment, ceases, unless the case is within some exception provided by the statute. A claim of homestead by the judgment debtor is not one of the exceptions mentioned in the statute, nor does the inability to enforce the judgment against the homestead prevent the suing out of an execution in order to keep the judgment alive.
2. **LIMITATION OF ACTIONS—*Exceptions made by Courts.***—As a general rule, courts have no power to add to the exceptions contained in a statute of limitations. The fact that the Legislature has made some exceptions is an indication that no others should exist. The exceptions to the general rule are very limited in character, and are to be admitted with great caution.
3. **JUDGMENTS—*Duration of Lien.***—A judgment may be kept alive perpetually by the issue of successive executions within the statutory period.

Appeal from a decree in chancery of the Law and Chancery Court of the city of Norfolk. Decree for defendants. Complainants appeal.

Affirmed.

Opinion.

The opinion states the case.

Burroughs & Bro., for appellants.

White, Tunstall & Thom, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

This suit was brought in the year 1903 to enforce the lien of a judgment on land which had been held as a homestead. The homestead was set apart in January, 1875, and the judgment was rendered in December of that year. An execution was issued, returnable to March rules, 1876, and returned "no effects." The householder died in the year 1900, leaving neither widow, nor minor child.

The defense is that more than twenty years had elapsed from March, 1876, before the institution of this suit, and that the judgment was barred by the statute of limitations.

Section 3567 of the Code, so far as it affects this case, provides that "Every judgment for money rendered in this State, heretofore or hereafter, against any person, shall be a lien on all the real estate of or to which such person is or becomes possessed or entitled at or after the date of such judgment. . . . This section is qualified by section 3649 and the three following sections."

By section 3573 of the Code it is provided, that "No suit shall be brought to enforce the lien of a judgment upon which the right to issue an execution, or bring a *scire facias*, or an action, is barred by sections thirty-five hundred and seventy-seven and thirty-five hundred and seventy-eight."

Section 3577, so far as it affects the question involved in this case, is as follows: "On a judgment, execution may be issued within a year, and a *scire facias* or an action may be brought within ten years after the date of the judgment; and where execution issues within the year, other executions may be

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issued, or a *scire facias* or an action may be brought within ten years from the return day of an execution on which there is no return by an officer, or within twenty years from the return day of an execution on which there is such return”

Section 3578, among other things, provides that “No execution shall issue, nor any *scire facias* or action be brought, on a judgment in this State, other than for the Commonwealth, after the time prescribed by the preceding section, except that, in computing the time, any time during which the right to sue out execution on the judgment is suspended by the terms thereof, or by legal process, shall be omitted”

It is conceded that, under the foregoing provisions of the Code, the right to issue execution, or bring a *scire facias* or action upon the judgment, or to enforce the lien thereof on real estate, other than the homestead, is barred by the statute of limitations. But it is insisted that under the provisions of section 3649 of the Code the right to subject the homestead land to the payment of the judgment is not barred. That section is as follows:

“When any person, entitled as a householder to the exemption provided for in section thirty-six hundred and thirty, ceases to be a householder, or when any person removes from this State, his right to claim or hold any estate as exempt under the provisions of this chapter shall cease; and upon the death of a householder, leaving neither wife nor minor children surviving him, or, if she or any of them survive him, and he leaves any estate which they or any of them are entitled to hold, or to have set apart to be held by them, as exempt under the preceding sections of this chapter, then upon her death or marriage, and if there be minor children, as soon as the youngest of those who attain the age of twenty-one years attains that age, or all marry, if they all marry before attaining that age, the exemption of any estate, real or personal, of such householder, then remaining and held as exempt under the provisions of this chapter, shall cease, and it shall pass as other real and personal

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estate, according to the law of descents and distributions, or as the same may be devised or bequeathed by said householder, subject to his debts; but the lien of a judgment, or decree for money, rendered against a householder, and which is not paramount to the exemption provided for in this chapter, shall, as to the real estate held as exempt by him, his widow, or minor children, attach to such only of that estate as he may be possessed of or entitled to at the time the exemption thereof ceases, as aforesaid, and until that time the said lien shall not be enforced."

Prior to the Code of 1887, where that section first appears, there had been a diversity of opinion as to what interest or estate the householder had in the property set apart as his homestead. To put at rest, as far as possible, that vexed question was one of the objects of that section.

Judge Burks, one of the revisors of the Code of 1887, says that the "main object of that section in declaring when the exemption shall cease was to fix the time when the judgment lien shall attach to the exempted real estate; and it is declared that it shall not attach except to such real estate as the householder shall have at the time the exemption ceases, and it shall attach then. This leaves the householder at liberty, while the exemption continues, to alien the exempted real estate, free from any encumbrance by the lien of a judgment (in the absence of waiver) recovered during the time the right of exemption exists, and thus enables him to make a good title to the purchaser, at least so far as any such judgment is concerned." Burks' Address before the State Bar Association, Reports Va. Bar Asso., vol. 4, pp. 137-8; 2 Barton's Law Pr. (2nd Ed. 1402).

In *Williams v. Watkins*, 92 Va. 680, 24 S. E. 223, in construing that section, it was held that, as to debts not paramount to the homestead exemption, the householder or head of a family holds the property set apart exempt, and may alien the same at pleasure; and although a limit is fixed to the duration of the homestead, no lien attaches thereon until that time has arrived.

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This being so, the judgment sued on never was a lien upon the homestead property. It was not rendered until after the homestead had been set apart, and it was barred by the statute of limitations before the exemption ceased. But if it were a lien, as the appellants insist, and they were prohibited from enforcing it until the exemption ceased, that prohibition did not suspend the running of the statute of limitations as to the judgment.

Section 3578 of the Code provides that "No execution shall issue, nor any *scire facias* or action be brought on a judgment in this State, other than for the Commonwealth, after the time prescribed by the preceding section, except that, in computing the time, any time during which the right to sue out execution on the judgment is suspended by the terms thereof, or by legal process, shall be omitted;"

Prohibiting the bringing of a suit to enforce the lien of a judgment is not one of the exceptions mentioned in the statute. The general rule is, that the courts have no authority to make any exception in favor of a party to protect him from the consequences of the statute, unless they come clearly within the letter of the saving clauses therein contained, and that the exercise of any such authority by the courts is an usurpation of legislative powers wholly unwarranted, and to which the courts should never resort. By making the exceptions which exist in the statute, the Legislature has exercised its prerogative, and the fact that no others were made clearly indicates that no others should exist, and the courts have no power to add any, however much the ends of justice in a particular case may seem to demand it. 2 Wood on Lim., sec. 252; Angel on Lim., ss. 194, 476; *Bickle, &c., v. Chrisman*, 76 Va. 678, 685; *Amy v. Watertown*, 130 U. S. 320, 32 L. Ed. 946, 9 Sup. Ct. 530.

There are, however, some exceptions to the general rule, it seems, and the statute may be suspended by causes not mentioned in the statute itself. But the cases where the general

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rule does not apply, as was said by the Supreme Court of the United States, in *Amy v. Watertown*, *supra*, are very limited in character, and are to be admitted with great caution; otherwise the courts would make the law instead of administer it.

The ground relied on in this case to take it out of the operation of the statute of limitations is not only not within the letter, but it is not within the spirit of the statute, and none of the cases cited furnish a precedent for holding that the general rule is not applicable to the case. There is nothing in section 3649 which prohibited the judgment creditor or the appellants from issuing other executions, or bringing a *scire facias*, to keep the judgment alive so that when the exemption ceased they would have a lien. But if the judgment, to which the lien owes its existence, is barred by the statute of limitations—has ceased to exist—it is clear that the lien, which is a mere incident to the judgment, has also ceased to exist. *Fleming v. Dunlap*, 4 Leigh. 341; *Underbaugh, &c., v. Reid*, 20 W. Va. 592.

The appellants' counsel insists, or at least suggests, that the utmost limit of a judgment is twenty years from the return day of an execution issued, and that the life of a judgment cannot be prolonged by issuing other executions.

Whilst doubts have been expressed by some members of the bar, and perhaps by some of the trial courts, whether or not under the provisions of section 3577 of the Code a judgment could be preserved in force after twenty years by issuing other executions, the better and the prevailing opinion seems to have been that it could. See Report of Revisors, Code of 1849, p. 920, note; *Rowe v. Hardy*, 5 Va. Law Reg. 672-675; Id. 861-2. But that question is no longer an open one, since the decisions of this court in *Gunnell v. Dixon*, 101 Va. 174, 43 S. E. 340, and *Wicks v. Scull*, 102 Va. 290, 46 S. E. 297, in which it was held that a judgment might be kept alive by the issue of other execu-

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tions within the statutory period. The same construction has been placed upon a similar statute by the Court of Appeals of the State of West Virginia. *Laidley v. Kline*, 23 W. Va. 565; *Riely v. Clark*, 31 W. Va. 571, 8 S. E. 509.

We are of opinion that there is no error in the decree appealed from, and that it must be affirmed.

Affirmed.

Syllabus.

Richmond.

MURRAY AND ANOTHER V. MOORE.

December 14, 1905.

1. PLEADING—*Misjoinder of Counts*.—A declaration containing counts in tort and on contract is bad on demurrer.
2. VERDICTS—*Not Responsive to Issues—Outside of Issue—Case at Bar*.—Where issue is joined upon a plea of not guilty to a declaration alleging fraud and conspiracy upon the part of defendants, whereby plaintiff was deprived of a valuable equitable interest in a gold mine, and his business and trade as a miner in said mine had been broken up and destroyed, and upon such issue the jury find for the plaintiff and "assess his damages for loss of service at five hundred dollars, and allow nothing for loss of interest in the mine," no judgment can be entered in favor of the plaintiff, as the verdict does not respond in his favor to any allegation in his declaration. As to the interest in the mine it is in favor of defendants, as to the plaintiff's business and trade as a miner it is silent; and no issue was or could have been made as to the plaintiff's loss of services.
3. EVIDENCE—*Fraud—Other Frauds—Collateral Facts—Irrelevant Matters*.—While great latitude is given to the admission of evidence where the issue is fraud, as for instance, the proof of other like frauds by the same party, at or about the same time, in order to show motive, this latitude will not be extended so as to embrace collateral facts not pertinent or relevant to the matter in issue in the suit in which it is offered, and certainly not so as to affect one of several defendants who was in no wise connected with such other frauds.
4. EVIDENCE—*Fraud—Collateral Matters—Impeachment of Defendant—Rehabilitation—Case at Bar*.—In an action of deceit against two defendants, alleging a conspiracy to defraud the plaintiff, the record of a prior suit in chancery by other parties to set aside as fraudulent a deed made by a third party to secure a debt due one of the now defendants, on the ground of fraud, to which the now plaintiff

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was not a party, nor a privy to any party, is not relevant nor pertinent to any of the issues made, and cannot be admitted in evidence; but if admitted, certainly counsel who prosecuted the chancery suit should be permitted to testify that no moral turpitude was charged against or attached to said defendant, and that the charge of fraud against him was purely technical.

Error to a judgment of the Circuit Court of Buckingham county in an action of trespass on the case. Judgment for the plaintiff. Defendants assign error.

Reversed.

The evidence sufficiently appears in the opinion of the court. On the motion of the plaintiff the court gave the following instructions:

"The court instructs the jury that if they believe, from the preponderance of evidence, that the defendants, Anderson and Murray, unlawfully combined to defeat the purchase by Moore of the mineral property in the suit mentioned, and did, by any unlawful means or devices, procure a substitution of themselves, or either of them, as purchaser thereof, to the exclusion of said Moore from any interest therein, and that the plaintiff was injured thereby, they shall find for the plaintiff and assess such damages to the plaintiff as they think proper, not exceeding the sum laid in the declaration.

"2. If the jury shall believe, from the evidence, that the said defendants did, with fraudulent intent to wrong and injure said Moore (plaintiff), and to deprive him of such rights (equitable or legal) as he may have acquired in the mineral property in controversy, and did so deprive him thereof, and of his employment thereunder, and that the plaintiff was injured thereby, they shall find for the plaintiff, and assess to him such exemplary damages for the wrongful act, in addition to the value of his property and employment as they deem right, not to exceed in all the damages laid in the declaration.

"3. The court further instructs the jury that circumstantial

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evidence of conspiracy and fraud in any case may be adequate without direct evidence thereof to support a verdict, but as to the credibility of the witnesses the jury are the exclusive judges.

"4. The court further instructs the jury that if they believe, from the evidence, that in November and early in December, 1902, N. H. Murray was acting for himself and Charles A. Moore in the financial matter of raising money for them jointly to complete their joint purchase of the mineral property mentioned in this case, and had arranged for a loan of \$5,000, and had called upon and gotten from Moore and wife a deed of trust, along with himself and wife to secure the same, and delivered said deed of trust to the agent of the lender without any condition attached to the delivery, the presumption will be that such loan was in fact gotten for the original purpose and for the mutual benefit of Moore and Murray, unless it shall clearly appear, from the evidence, that said Murray had resigned his trust relation and joint purchase with Moore and given the latter due notice thereof before such delivery of the deed of trust, and if said Anderson, knowing the relations existing between Murray and Moore, confederated, without Moore's knowledge, in any breach of trust or fraud upon Moore to said Moore's damage and injury, then said Anderson is equally liable with Murray, and the jury must find for the plaintiff, and assess his damages to such sum as they shall think proper, not in excess of the damages laid in the declaration."

In lieu of two instructions offered by the defendant, the court gave the following instruction:

"The court instructs the jury that a conspiracy and fraud alone is never sufficient to support an action for damages; something pursuant to the conspiracy and fraud must be done from which damage or injury has proximately resulted to the plaintiff, and unless the jury believe from the preponderance of the

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evidence that the defendants, N. H. Murray and R. M. Anderson, conspired to thus injure the plaintiff, C. A. Moore, in one of the particulars in the declaration mentioned, and did injure him, they must find a verdict for the defendants."

H. D. Flood, for the plaintiffs in error.

R. T. Hubbard, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

Charles A. Moore and N. H. Murray held an option on what was considered a valuable gold-mining property, situated in Buckingham county, Virginia, known as the Bondurant Gold Mine, which gave to Moore and Murray the right to work and develop the mine during the continuance of the option, but to expire by its terms on December 1, 1902, if the property was not purchased by Moore and Murray on or before that date.

A company was organized and stock issued. Moore worked and managed the mine, and Murray undertook to finance the enterprise by the sale of stock, and the negotiation of loans. R. M. Anderson was a large merchant, doing business near the mine and deriving considerable profit by selling supplies to the mine operatives and their workmen, and for this reason was very much interested in the continuance and success of the operation of the mine. On December 1, 1902, Moore and Murray were unable to comply with the terms of the option contract, and the same expired by limitation. Subsequently R. M. Anderson aided Murray in making another contract with the owners of the mine, by which Murray became the purchaser thereof with the view of carrying on the work. Whereupon, Moore instituted his action of trespass on the case in the Circuit Court of Buckingham county against Murray and Anderson, charging them with a conspiracy to defraud him; the gravamen of the amended declaration upon which the case was tried be-

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ing that defendants "did combine, confederate and conspire to defraud and injure the plaintiff, and to deprive him of a valuable equitable interest in a gold mine in said county" (Buckingham) "and to break up and destroy his business or trade of miner in said mine." The facts and circumstances of the alleged fraud and conspiracy are then set out in detail, and the declaration concludes with the charge, that "by reason of which conspiracy and fraud of said defendants against said plaintiff, and wicked devices in the execution thereof, said plaintiff has been injured in the destruction aforesaid of his business and deprivation of his said mineral rights in the sum of \$6,000.00."

The demurrer to the declaration being overruled, issue was joined on the defendants' plea of not guilty, and upon this issue the jury rendered the following verdict: "We, the jury, upon the issue joined, find for the plaintiff and assess his damages for loss of services at five hundred dollars, and allow nothing for loss of interest in the mine." To the judgment upon this verdict this writ of error was awarded.

We are of opinion that the amended declaration set out, and with sufficient clearness, the plaintiff's cause of action, and that there was no error in overruling the demurrer thereto. In fact the demurrer was not urged in the oral argument here.

It will be observed that upon the allegation of the declaration, that the conspiracy and fraud of the defendants had deprived plaintiff of a valuable equitable interest in the Bondurant Gold Mine, the jury found for the defendants; and on the other allegation, that the fraud charged had broken up and destroyed plaintiff's business or trade as a miner in said mine, the verdict is silent. There was no allegation in the declaration that plaintiff was deprived of the services of any one, or that he had been deprived of compensation for his own services, by any act or default of the defendants, and had there been such an allegation it would have rendered the declaration plainly demurrable, on the ground that the plaintiff was seeking to recover for a tort

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and in assumpsit in the same action. This cannot be done in any case; therefore, as the verdict of the jury does not respond in plaintiff's favor to any allegation in his declaration clearly it was error to enter judgment for him thereon. But as we must remand the case for a new trial, it is necessary to consider other assignments of error relating to the introduction and refusal of evidence during the progress of the last trial.

It appears that during the cross-examination of the defendant, Murray, the plaintiff offered to introduce three letters, which it was claimed had been written by Murray to Moore, two in November, 1901, and one in August, 1902; to the introduction of which the defendants, by counsel, objected, on the ground that the letters were not pertinent to the inquiry before the jury, and would tend to prejudice them against defendants. But the objection was overruled, and the letters were introduced in evidence, to which ruling the defendants excepted.

The court is of opinion that this exception is well taken. These letters formed a part of a correspondence between the plaintiff, Moore, and the defendant, Murray, when these parties were endeavoring to make a false impression as to the value of the Bondurant Gold Mine property, in order to make sale of the stock of the company organized under the option they then held, and with which transactions or correspondence the defendant Anderson had no connection or interest. The letters indicate plainly that both the writer, Murray, and Moore, to whom they were addressed, were using very disreputable devices to make a success of the undertaking in which they were engaged at the time, but they tended to prove only collateral facts not pertinent nor relevant to the matter in issue in this suit. It is true that large latitude is always given to the admission of evidence where the issue is fraud, as where fraud in the sale or purchase of property is in issue, evidence of other frauds of like character, committed by the same parties, at or near the same time, is admissible, its admissibility being placed upon

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the ground that where transactions of similar character are executed by the same parties, and closely connected in point of time the inference is reasonable that they proceed from the same motive. *Piedmont Bank v. Hatcher*, 94 Va. 229, 26 S. E. 505, and authorities cited. But that is not the case here. The conditions were not such as to make the letters in question admissible as evidence against the defendant Murray, and it is inconceivable that they could have been introduced to the prejudice of the defendant Anderson under any conditions. *Greenleaf on Ev.*, sec. 458; *Trogden's Case*, 31 Gratt. 862; *Moore v. City of Richmond*, 85 Va. 538; 8 S. E. 387.

The 5th, 6th, 7th and 8th assignments of error may be considered together.

It appears that while the defendant Anderson was on cross-examination by plaintiff's counsel, he was asked if he had ever been found guilty of any other fraudulent transaction by decree of the court in which he was then testifying; to which he answered that he "never knew or heard of such charges." Whereupon, over the objection of counsel for the defendants, the plaintiff's counsel introduced in evidence certain parts only of the record in a chancery suit finally ended in the Circuit Court of Buckingham county several years before, in which a deed was attacked and set aside as being a fraudulent conveyance of property to different parties, among others to a trustee to secure the payment of a debt of \$500 due to Anderson. And, after the said parts of the chancery record had been allowed to go to the jury, the defendants offered to introduce as witnesses the attorneys who represented both parties in that suit, and who were then present in court, willing to testify that in the prosecution of the said chancery suit neither side considered that Anderson was guilty of any moral turpitude in connection with the transaction which was attacked, and that the charge against him was purely technical, so far as the charge of fraud was concerned; but the objection of the plaintiff to the introduction of said attorneys as witnesses was sustained.

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We are of opinion that the error in the rulings of the Circuit Court in this connection is two-fold. First, in no view of the proceedings in the chancery suit was the record therein or any part thereof relevant or pertinent to the issue being tried in this suit. The plaintiff, Moore, was neither a party nor a privy to any party to the chancery suit, and the introduction of that record or any part of it in this suit could only serve to draw away the minds of the jury from the point in issue, and to excite prejudice and mislead them. There are exceptional conditions under which evidence of that character might be admissible, but they did not exist in this case. *Piedmont Bank v. Hatcher, supra*; *Bargamin v. Clarke*, 20 Gratt. 544.

Second, portions of the record in the ended chancery suit having gone to the jury, the purpose and effect of which was to attack Anderson's character and to prejudice the minds of the jury against him, it was unjust and unfair to the defendants to deny them the right to refute the attack by the introduction of witnesses who would testify to the *bona fides* of Anderson's conduct in the transaction dealt with in the chancery suit.

The 9th and 10th assignments of error relate to the giving, over the objection of the defendants, of certain instructions for the plaintiff, and the refusal to give others asked by the defendants except as modified by the court.

With reference to these assignments, we consider it only necessary to say that we are further of opinion that the defendants were not prejudiced by the four instructions given at the instance of the plaintiff, nor by the giving of the one instruction in lieu of the two they asked. The instructions, as given, fairly submitted the question at issue to the jury, and could not have misled them to the defendants' injury.

The remaining assignment of error requiring consideration is to the refusal of the court to set aside the verdict of the jury as contrary to the law and the evidence.

It is only necessary to say, in addition to what has been said of the verdict, that if it is to be interpreted as meaning that

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the plaintiff was injured by being thrown out of employment, and damages awarded him for that reason, which would seem to be the only interpretation to be given their finding, the evidence utterly fails to sustain it. In fact, there is no evidence whatever of that character in the record, nor does the finding in favor of the plaintiff of damages for loss of services respond to any issue made in the pleadings.

The judgment of the Circuit Court will be reversed and annulled, the verdict of the jury set aside, and the cause remanded for a new trial to be had in accordance with the views expressed in this opinion.

Reversed.

Syllabus.

Richmond.

ELLIOTT v. ASHBY, RECEIVER.

December 14, 1905.

1. APPEAL AND ERROR—*Amount in Controversy—Judgment for Quota of Stock.*—Where the validity of a stock subscription for more than \$300 is drawn in question by a judgment for an assessment upon said stock for less than \$300, this court has jurisdiction of a writ of error to said judgment.
2. STATUTES—*Construction—Re-enactment.*—Where the language of a constitutional provision and of a statute has been construed by this court and since that time there has been a general revision of the laws and a new constitution has been adopted, each of which retains the language construed, such construction will be taken to have been approved.
3. STOCK SUBSCRIPTIONS—*Action by Receiver—Defenses—Code, Sec. 1103a.*—In an action by a receiver, under Code, (1904), Sec. 1103a, to recover an unpaid stock subscription, the defendant is not confined to please by way of confession and avoidance, but may show that he never subscribed to or became a stockholder in the company. The object of the statute was to take away from courts of chancery the power to fix the liability of the stockholder, and to transfer all questions affecting the validity of the subscription to the courts of common law, at the same time leaving the courts of chancery the ascertainment of the indebtedness of the company, the amount necessary for its liquidation, the percentage to be paid by each stockholder, and the appointment of a receiver to collect the assessments.
4. STOCK SUBSCRIPTIONS—*Release of Subscription—How Proved—Case at Bar.*—While a stock subscription in a joint stock company can only be released by the stockholders, or by the Board of Directors duly authorized by them, yet such release can be proved not only by the records of the company, but also by other evidence showing that such subscription was in fact not regarded by the company as

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binding on it, and that the subscriber was not regarded by himself or by the company as a stockholder thereof. In the case at bar, the evidence was sufficient to warrant a jury in finding that the defendant's subscription was not regarded by himself or the company as binding upon him, and the trial court should have so decided on the demurrer to the evidence by the plaintiff.

Error to a judgment of the Corporation Court of the city of Newport News, upon a motion for a judgment for money. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

A. C. Garrett, for the plaintiff in error.

Ashby & Read, for the defendant in error.

KEITH, P., delivered the opinion of the court.

A chancery suit was brought by Phipps against the Schulz Brewing Company and others, an insolvent corporation, for the payment of its debts, which resulted in an assessment of fourteen *per cent.* upon the stock subscribed, and C. A. Ashby was appointed a receiver, with direction to bring an action at law in his own name against the several subscribers for that amount.

Acting under this order, the receiver gave notice of a motion for judgment against J. W. Elliott, which afterwards came on for trial in the Corporation Court of the city of Newport News, and a judgment was rendered against the defendant for \$140. To this judgment a writ of error was awarded the defendant.

We are met by a motion to dismiss the writ of error for want of jurisdiction; defendant in error relying upon the proposition, which as a general rule is true, that the real matter in controversy is that for which the suit is brought and judgment is rendered, and not that which may or may not come in

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question—in other words, that the sole test of jurisdiction is the amount which the defendant may pay and thereby discharge himself, and if that sum be less than the minimum jurisdiction of the court, the appeal or writ of error should be dismissed.

On behalf of the plaintiff in error it is urged, that while the judgment before us is for \$140, which could be satisfied by the payment of that sum, this suit involves the liability of plaintiff in error (defendant in the court below) upon a stock subscription amounting in the aggregate to \$1,000, which was the real subject in controversy.

It is needless to consider what our view would be of the law, were the subject an open one in this court. In the case of *Stuart v. Valley Railroad Co.*, 32 Gratt. 146, it was held, that though the judgment against S. for the \$300, and interest was less than \$500, yet the subject in controversy was the validity of the subscription for five shares of stock (of the par value of \$500), and the Court of Appeals had jurisdiction to hear the case. That case was decided at the September term, 1879, Judge Moncure delivering the opinion.

Since that time the laws of the State have been codified, and two of the judges who were then upon the court were upon the commission charged with that duty, and the statute upon the subject was re-enacted *in totidem verbis*. More than that, since that time a new Constitution has been adopted, which has retained, so far as it affects this case, the language of the preceding Constitution, which was the law when *Stuart v. Railroad Co.* was decided. The jurisdictional sum, it is true, was diminished from \$500 to \$300, but in no other respect was it changed.

We have, then, a judgment of this court, which has remained unquestioned as the law of this State for more than a quarter of a century, construing a provision of the Constitution and a statute passed in pursuance thereof, and the construction placed upon them has not only been unchallenged, but must be taken as having been approved by the adoption of the identical language in the Code and the Constitution.

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Defendant in error also insists that plaintiff in error could not question in the court of law the fact that he had subscribed to and become a stockholder in the Schulz Brewing Company; but that he would be confined to defenses in the nature of confession and avoidance; that is to say, which admit that he had subscribed as a stockholder, but that by reason of fraud or misrepresentation he should not be bound by his contract of subscription; and in support of this proposition cites *Reed v. Gold*, 102 Va. 37, 45 S. E. 868, where it is said: "When the proportion which each delinquent shareholder is to pay has been ascertained, the receiver is directed to institute suit against him at law, upon his refusal to pay it, and in that suit the stockholder may make any defense which involves the validity of his subscription; but we do not understand that it authorizes the court of law to rehear and to review matters which are necessarily adjudicated in the court of chancery."

The statute which was there being construed now appears as section 1103a of Va. Code, 1904.

"All suits or motions for the recovery of unpaid subscriptions to the stock of any joint stock company shall be brought in the courts of common law of this Commonwealth in the county or corporation where the defendant resides, if he be a resident of this State, or in the case of a joint or partnership subscription then in the county or corporation in this State in which either of the joint subscribers, or any member of the partnership subscribing shall reside; and said courts shall have exclusive jurisdiction to hear and determine all questions involving the validity of such subscriptions, but nothing herein contained shall be construed to deprive courts of chancery of their jurisdiction to settle and wind up the affairs of insolvent corporations, or to make assessments on unpaid stock subscriptions."

That section, on its face, applies to questions which are to be heard and determined in the chancery courts. For instance, the Chancery Court ascertains the indebtedness of the corporation, the amount necessary for its liquidation, the percentage

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which is to be paid by each stockholder, and appoints a receiver to enforce its decree. But the statute in unmistakable terms declares, that the courts of law shall have jurisdiction to hear and determine all questions involving the validity of such subscriptions; and the quotation from *Reed v. Gold, supra*, conforms strictly to the terms of the statute.

As a matter of course, all who appear to be stockholders must be brought before the Chancery Court, and it proceeds upon the assumption that all who appear to have subscribed to stock are bound for its payment; otherwise, it would be impossible for it to ascertain what amount should be collected from each; but the object of the statute was to take away from courts of chancery the power to fix the liability of the stockholder, and to transfer all questions affecting the validity of the subscription for inquiry and adjudication in the courts of common law.

Upon the trial, after the plaintiff had introduced evidence to prove the subscription list upon which the company was organized, and that plaintiff in error had signed his name thereto, subscribing to ten shares of stock, at the par value of \$100 each, and that the company had been duly organized, its indebtedness, the institution of the chancery suit to wind up its affairs, the appointment of a receiver with direction to collect fourteen *per cent.* of the par value of the stock of each subscriber—in other words, had made out a *prima facie* case—the defendant introduced a witness who testified that he was a stockholder in the company; that together with one Newkirch they called upon the defendant Elliott, explained to him the plans of the company and induced him to subscribe for ten shares of the stock; that when the charter was obtained Newkirch was named as secretary and treasurer; that within from three to five days after his subscription, and at least six days before the charter of the company was obtained, Elliott 'phoned to him that he had decided to take his name off the list; that he told Mr. Elliott to write him a letter to that effect, which he said he would do, and did do, which letter is as follows:

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"J. W. Nollison, Esq.,

"City.

"Dear Sir:

"A few days since, upon your solicitation, I subscribed ten shares to the capital stock of a company to be organized and chartered, and to be known as the Leon Schulz Brewing Company. For certain reasons, which appear to my mind good and sufficient, I now desire to rescind my action in this matter, and request you to erase my name from said subscription papers, and fully cancel my said subscription.

"Yours truly,

"J. W. ELLIOTT."

Witness further testified that he never saw the subscription list after that time; that if he had gotten hold of it he would have erased Mr. Elliott's name therefrom, as he felt in honor bound so to do; that he asked Mr. Newkirch to erase Mr. Elliott's name, and Mr. Newkirch promised to do so; that he did not know whether the same had been done or not until he saw the subscription list at the time of the chancery suit; that as far as he knew Mr. Elliott was never considered by the stockholders of the company as a subscriber; and then, being asked by counsel for defendant what he meant by "as far as he knew," said, "well, that the secretary was notified to strike his name off;" that he understood that Mr. Elliott was not regarded as a stockholder, and that Mr. Elliott did not regard himself as a stockholder; that he did not know whether the charter was granted upon the subscription list in evidence or not.

It does not appear that Mr. Elliott ever acted as a stockholder, or participated in any way in the affairs of the company. There was evidence of other stockholders that they understood that Mr. Elliott was a stockholder, and regarded him as such.

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This being the testimony, the defendant in error (plaintiff in the court below) demurred to the evidence, and the jury found the following verdict: "We the jury find for the defendant subject to the court's opinion upon the demurrer to the evidence, and if upon such demurrer to the evidence the court finds for the plaintiff, then we find for the plaintiff, and assess his damages at \$140.00." Upon this verdict the court rendered a judgment in favor of the plaintiff.

It is unnecessary to discuss the statute which controls in such cases, as it has been so frequently discussed and enforced as to be familiar to all.

In *Stuart v. Valley Railroad Co.*, *supra*, it is held, that though a contract of subscription to the stock of a company can be released only by the stockholders, or by the board of directors duly authorized to do so by the stockholders, "yet such release can be proved not only by the records of the company, but also by other evidence showing that such subscription was in fact not regarded by the company as binding upon it, and that the subscriber was not regarded by himself or by the company as a stockholder thereof."

Tested by this principle, we are of opinion that the judgment upon the demurrer should have been for the plaintiff in error. The testimony of Rollison was sufficient to warrant the jury in finding that Mr. Elliott's subscription was not regarded either by himself or by the company as binding upon him.

The judgment of the Corporation Court must be reversed, and this court will enter such judgment as it should have rendered.

Reversed.

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HAGAN v. CITY OF RICHMOND.

December 14, 1905.

1. **INTERSTATE COMMERCE—Obstructing Harbors—Removal of Wrecks—Action by Congress—Concurrent Jurisdiction of State.**—Conceding the paramount authority of Congress to assume absolute and exclusive control over the navigable waters of the United States, still it has not chosen to exercise that power in the matter of removing wrecks from harbors within a State, and the State may, in aid of commerce, enact appropriate laws for the removal of obstructions from harbors and navigable streams wholly within its limits, when not in conflict with any act of Congress or system provided by it. The mere fact that Congress has legislated on the subject does not deprive the State of all jurisdiction in the premises. Section 19 of the River and Harbor Bill (30 U. S. Stat. at Large, p. 1154), relating to the removal of obstructions from navigable rivers and harbors is not restrictive of the power of the State to enact appropriate legislation to accomplish the same ends.
2. **INTERSTATE COMMERCE—State Statutes—Incidentally Affecting.**—Although a State statute may incidentally affect interstate commerce, it is not necessarily an obstruction, but may be in aid of commerce and a valid exercise of the police power of the State.
3. **INTERSTATE COMMERCE—Removing Wrecks—Personal Liability of Owner of Vessel—Policy of Congress Exclusive—Code, Sec. 2011 Invalid.**—Inasmuch as Congress has outlined a definite policy of limiting the liability of owners of ships and vessels, lost without personal negligence on their part, to the value of the ship or vessel and "her freight then pending" (Rev. Stats. U. S. Sec. 4283, and 30 U. S. Stat. at Large, p. 1154), its enactments on this subject are paramount, and Sec. 2011 of the Code, and Sec. 8, ch. 77 of the ordinances of the City of Richmond in so far as they provide for

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the removal, "at the expense of the owner," of wrecked vessels obstructing the harbor in the City of Richmond, are invalid, unless the obstruction occurred with the knowledge and privity of such owner.

Error to a judgment of the Circuit Court of the city of Richmond in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The facts of this case, which are undisputed, and the sections of the Code and charter and ordinances of the city of Richmond relied on to sustain the demand asserted by the city against the plaintiff in error, are set out in the opinion of the judge of the Circuit Court as follows:

"It appears from the facts developed in this case that defendant's barge, 'John Hagan,' loaded with coal, from Philadelphia, Pa., to Richmond, Va., when nearing Richmond struck a rock, filled with water, and, before it could reach the wharf, sunk in the harbor of Richmond on July 3, 1898, thereby obstructing navigation; that in the same month the Council Committee of the city of Richmond took the matter up with the owner, Peter Hagan, and endeavored to have him remove the wreck.

"The various proceedings of this committee, the correspondence, and the resolutions adopted, are in evidence. It appears therefrom that this sunken barge was a serious menace to navigation as it lay in the harbor, that after it had been there several months, the house on top of it was washed away and there was nothing to mark it. More than a year elapsed, during which demand after demand was made by the city upon Hagan to remove it, but he still delayed. Then it was that the city took final action and had the barge blown up and removed from the harbor, at a cost of \$442.75, which sum was demanded from Hagan, but he refused payment. The city instituted this action in October, 1899, to recover the amount expended.

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"The whole question of law and fact, a jury having been waived, was submitted to the court.

"The city, to support its action, introduced sections 2011 (as amended by Acts, 1889-90, p. 624), 2012, 2013 and 2014 of V. C. 1887; section 19, sub-section 6, of the charter of the city of Richmond; and ch. 77, sec. 8, of the city ordinances.

"Sec. 2011. 'They (the Board of Harbor Commissioners of Norfolk and Portsmouth) shall have authority to cause the removal of any wharf, dock, wreck, or other obstruction to navigation, or that may, in their opinion, be injurious to the harbor, or that may cause shoaling at any point in the channel of said river, its branches or tributaries, at the expense of the owner or party causing the obstruction; provided, the rights of any owner of a wharf whose lines have been heretofore fixed by authority of law shall in no way be disturbed.'

"Sec. 2012. 'The said board, if in their judgment expedient, may employ the services of a competent engineer at any time, who may make a survey of any waters lying within their jurisdiction, and perform such other duties as the board may require of him.'

"Sec. 2013. 'When any dredging is done in any of the waters aforesaid, the board shall have power to designate the places at which the dredging material shall be dumped.'

"Sec. 2014. 'The said board shall have power to make and enforce such rules and regulations for the preservation of the harbor, its police government, and the better use of the wharf, mooring, and other facilities thereof, as they may from time to time deem proper.'

"Sec. 19. Sub-section 6 of the city charter. (The city council shall have power to make such ordinances, by-laws, orders, and regulations as they may deem desirable to carry out the following powers, which are hereby vested in them:) 'To establish, construct, and keep in order, alter or remove, landings, wharves, and docks on lands belonging to the city; and to lay and collect a reasonable duty on vessels coming to and using

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the same, and to regulate the manner of using other wharves and landings within the corporate limits; to prevent or remove all obstructions in and upon any landings, wharves, or docks. They may also appoint port-wardens for the port of said city, who shall exercise such powers as the council may give them up to the port-warden's lines, as they may be established from time to time by the United States Government, and fix their fees and compensation. The said city shall have power to improve and keep in good, safe, and navigable condition the harbor of James river within the corporate limits. The city council of said city shall have all the powers set forth in sections two thousand and eleven, two thousand and thirteen, and two thousand and fourteen of the Code of Virginia, eighteen hundred and eighty-seven, which powers it may delegate to some proper committee of persons satisfactory to said council.'

"Chap. 77, sec. 8, of the City Ordinances. 'The committee on improvement of James river shall have power to fix lines along said harbor within which riparian owners may erect wharves, docks and proper structures and fixtures for commercial and manufacturing purposes.'

"'They shall have authority to cause the removal of any wharf, dock, wreck, or other obstructions to navigation, or that may, in their opinion, be injurious to the harbor, or that may cause shoaling of said harbor, its branches or tributaries, at the expense of the owners or the party causing the obstruction, provided, the rights of any owner of a wharf whose lines have been heretofore fixed by authority of law shall in no way be disturbed.'

"Also, witnesses were introduced to prove the various steps taken by the city in order to have the sunken barge removed.

"It was admitted that the harbor of Richmond was within the corporate limits, and that the James river was wholly within the confines of the State of Virginia.

"The city proved that the sum expended, and for which it brought its action, was a reasonable and necessary expenditure

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for the public benefit in order to keep the harbor open for navigation, and, further, that every possible opportunity was given to Hagan to remove the barge before action was taken, even waiting for more than a year, and it only acted in the face of the advance of fall and winter, when navigation would be rendered more dangerous."

The plaintiff in error, Hagan, on the other hand, rests his defense upon the commerce clause of the Constitution of the United States (Art. I, sec. 8, cl. 3); section 19 of the act of Congress of March 3, 1899—the river and harbor bill—(30 U. S. Stat. at L., p. 1154); and the Limited Liability Act (sec. 4283 Rev. Stat. U. S.).

Jno. A. Lamb, Hamilton Rogers and Ro. H. Talley, for the plaintiff in error.

H. R. Pollard, for the defendant in error.

WHITTLE, J. (after making the foregoing statement of the case), delivered the opinion of the court.

Two questions are submitted upon this writ of error for our determination.

1. It is insisted on behalf of the plaintiff in error, that section 19 of the River and Harbor Bill was intended to invest the Secretary of War with exclusive jurisdiction in the matter of removal of obstructions contemplated by the statute from the navigable waters of the United States.

The section is as follows: "That whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruc-

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tion can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold or otherwise disposed of by the Secretary of War at his discretion, without liability for any damage to the owners of the same. Provided, that in his discretion, the Secretary of War may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed 'To Whom It May Concern,' in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof; and provided also, that the Secretary of War may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States. Provided, that such bidder shall give satisfactory security to execute the work. Provided, further, that any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph, shall be covered into the treasury of the United States."

It must be allowed, that in the absence of Legislation on the subject by Congress, it would be within the competency of the several States, in the interest of their citizens and in the reasonable exercise of their police power, to remove obstructions from rivers and harbors, and other navigable waters of the United States, wholly within their limits. If it were true, as contended, that the mere fact that Congress had legislated on

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the subject divested the States of all jurisdiction in the premises, it would deprive them of many conceded rights as to which they exercise concurrent jurisdiction with the United States.

The paramount authority of Congress to assume such absolute and exclusive control over the navigable waters of the United States may be conceded. But it is plain from an examination of section 19 that it has not chosen to exercise that power in the present instance. If it had been the design of Congress to deprive the States of the important and essential right to police the rivers and harbors within their respective limits, it is inconceivable that it would have declared that purpose in language of doubtful import. There is nothing in the phraseology of the section to warrant that construction; but, on the contrary, the object of the enactment was evidently intended to clothe the Secretary of War with large discretionary powers which he might exert or leave to the enforcement of local authorities, as his judgment might dictate. The object of the legislation is to keep the navigable waters of the United States clear and unobstructed; and supplemental legislation on the part of the States in furtherance of that design is in aid of commerce, and where not in conflict with any system adopted by Congress, is universally upheld. The States have no control over the discretion of the Secretary of War, and if he should fail or decline to act in a given case, it would be most unreasonable to hold that the local authorities are powerless to protect their domestic commerce by keeping navigable waters, wholly within their respective limits, unobstructed.

The correspondence between an officer of the War Department and the city engineer shows that he so interpreted the act of Congress, because, while he states that an appropriation had been made for the purpose and he had been authorized to remove the wreck, he interposed no objection to the city authorities removing it, and pointed out the best method to accomplish it.

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But we find abundant authority to sustain the concurrent jurisdiction of the Federal and States Governments in this class of cases.

The doctrine is thus stated by Ray in his work on Negligence of Imposed Duties, at pp. 483-4: "So long as the State legislation is not in conflict with any law passed by Congress, in pursuance of its powers, and is merely intended and operates, in fact, to aid commerce, and to expedite instead of hindering the safe transportation of persons and commodities from one Commonwealth to another, it is not repugnant to the Constitution of the United States, and will be enforced either as supplementary to partial Federal statutes relating to the same subject, or in lieu of such legislation where Congress has not exercised its power at all."

In Southerland's notes on the United States Constitution (Ed. of 1904), pp. 102, 104, it is said: "The States have concurrent powers with Congress in matters which are local in their operation, or which are mere aids to commerce, or which relate to rights, duties and liabilities of citizens, although indirectly and remotely affecting operations of commerce; e. g., the regulation of wharves, the establishment of buoys and beacons, the improvement of harbors. . . . When, however, Congress has acted with relation to such matters as these, State laws in conflict with congressional action are void, and while the commerce clause does not comprehend internal domestic commerce, the power enters the interior of every State whenever the interests of foreign or interstate commerce require."

Again, it is said in Ray on Negligence of Imposed Duties, at p. 496: "within the second class of cases—that is of what might be termed concurrent jurisdiction—are embraced laws for the regulation of pilots; quarantine and inspection laws; and the policing of harbors; the improvement of navigable channels; the regulation of wharves, piers and docks; the construction of dams and bridges across navigable waters; and the establishment of ferries."

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The concurrent jurisdiction of the United States and of the several States, in supplying local aids and instrumentalities, in respect to commerce, is fully recognized in the opinion of Chief Justice Taney, in the case of *The James Gray v. The Ship John Fraser*, 21 How. 184, 16 L. Ed. 106, where it was held, that an ordinance of the city of Charleston prescribing what part of the harbor a vessel should occupy, how long she might remain in port, the character of lights she should display at night, and other similar regulations, was not in conflict with the act of Congress regulating commerce and the general admiralty jurisdiction conferred on the United States courts, and is valid.

In *Faust v. City of Cleveland*, (from the Circuit Court of Appeals, Sixth Circuit), 121 Fed. 810, it was said: "The river Cuyahoga is a navigable river, and, as such, is subject to the control of Congress, and to its regulations and general supervision. But the interest of the State in its own domestic commerce is such that the regulation of Congress is not necessarily exclusive of all control or authority by the State. It has therefore been held that legislation by the State for the purpose of aiding commerce by the improvement of such streams by providing for the deepening of the channels or the removal of obstructions, does not encroach upon the power of Congress, if not in conflict with any system for their improvement provided by Congress." Citing *Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238, in which case Mr. Justice Field, in an able and exhaustive opinion sustained the validity of an act of the Legislature of Alabama providing for the improvement of the river, bay and harbor of Mobile, as not conflicting with the power of Congress under the Commerce Clause of the Constitution.

In the case of *Lake Shore, &c., R. Co. v. Ohio, &c.*, 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. 465, Mr. Justice Harlan observes, that the decisions of that court recognize "the fundamental principle, that outside of the field directly occupied

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by the general government, under the powers granted to it by the Constitution, all questions arising within a State that relate to its internal order, or that involve the public convenience or the general good, are primarily for the determination of the State, and that its legislative enactments relating to these subjects and which are not inconsistent with the State Constitution are to be respected and enforced by the courts of the Union, if they do not, by their operation, directly intrench upon the authority of the United States, or violate some right protected by the National Constitution. The power here referred to is, to use the words of Chief Justice Shaw, the power to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same." Citing *Commonwealth v. Alger*, 7 Cush. 53, 85.

The *Postal Tel. Co. v. Umstadter*, 103 Va. 742, 50 S. E. 259, is one of a line of cases in this court to the effect, that although a State statute may incidentally affect interstate commerce, it is not necessarily an obstruction, but may be in aid of commerce, and a valid exercise of the police power of the State. The principle is illustrated by numerous decisions of the Supreme Court of the United States, which sustain the validity of State legislation of the character involved in the first branch of our inquiry. *Gibbons v. Odgen*, 9 Wheat, 196, 6 L. Ed. 73; *Brown v. Maryland*, 12 Wheat. 419, 446, 6 L. Ed. 678; *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. Ed. 243; *Railway Co. v. Fuller*, 17 Wall. 560, 21 L. Ed. 710; *Brown v. Huston*, 114 U. S. 630, 29 L. Ed. 257, 5 Sup. Ct. 1091; *Lake Shore, &c., Ry. Co. v. Ohio*, 165 U. S. 365, 368, 41 L. Ed. 747, 17 Sup. Ct. 357; *Missouri, &c., Ry. Co. v. Hoover*, 169 U. S. 613, 42 L. Ed. 878, 18 Sup. Ct. 488; *Cummings v. Chicago*, 188 U. S. 410, 428, 47 L. Ed. 525, 23 Sup. Ct. 472; *Montgomery v. Portland*, 190 U. S., 89, 106, 47 L. Ed. 965, 23 Sup. Ct. 735.

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2. The second contention of plaintiff in error is that the Circuit Court erred in rendering a personal judgment against him for the expense incurred by the city in blowing up and removing the sunken barge "John Hagan" from its harbor.

In that connection it is insisted that sec. 19 of the River and Harbor Bill and sec. 4283 of the Revised Statutes of the United States provide, that there shall be no personal liability upon the owner of a vessel in a case such as we are considering.

The latter section reads: "The liability of the owner or owners of any ship or vessel, for any embezzlement, loss or destruction by the master, officers, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners shall in no case exceed the amount or value of the interest of such owner or owners, respectively, in such ship or vessel, and her freight then pending."

This limited liability act is said to be the outgrowth of modern maritime law and codes. The first act of Congress on the subject was passed March 3, 1851; and in the case of *Norwich & N. Y. Trans. Co. v. Wright*, 13 Wall, 104, 20 L. Ed. 585, the policy of the legislation is explained by Mr. Justice Bradley as follows: "The great object of the law was to encourage shipbuilding, and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional

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losses and damage to an indefinite amount. How many enterprises in mining, manufacturing, and internal improvements, would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions by which they are exempt from personal liability, or from liability except to a limited extent? The public interests require the investment of capital in shipbuilding quite as much as in any of these enterprises. And, if there exist good reasons for exempting innocent ship-owners from liability, beyond the amount of their interest, for loss or damage to goods carried in their vessels, precisely the same reasons exist for exempting them to the same extent from personal liability in cases of collision. In the one case, as in the other, their property is in the hands of agents whom they are obliged to employ."

We think it quite clear, in light of the foregoing exposition of the limited liability act that where a vessel is lost without the privity or knowledge of the owner, he is only liable to the extent of his interest in the vessel, and cannot be held personally responsible for expenses incurred by local authorities in removing the wrecked vessel from their harbor. Hughes on Admiralty, p. 321.

As remarked, that is also the measure of liability fixed by section 19 of the United States River and Harbor Hill, *supra*; and it follows from the authorities cited, that, inasmuch as Congress has outlined a definite policy limiting the liability of owners of ships and vessels lost without personal negligence on their part, its enactments are paramount, and section 2011 of the Code and section 8 of Ch. 77 of the Ordinances of the City of Richmond, in so far as they declare that the Board of Harbor Commissioners and the Committee on Improvements of James River shall have authority to cause the removal of any wreck which in their opinion is injurious to the harbor, "at the expense of the owner," are in conflict with that policy and invalid unless the obstruction occurs with the privity or knowledge of such owner.

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For these reasons, we are of opinion that the Circuit Court erred in rendering a personal judgment against the plaintiff in error in this instance, and for that error its judgment must be reversed.

Reversed.

Syllabus.

Richmond.**THE UNITED MODERNS v. RATHBUN AND OTHERS.**

January 18, 1906.

1. **EVIDENCE—*Constitution and By-Laws of Corporation—Knowledge of Member—Changes—Burden of Proof.***—Members of a beneficial society are presumed to know its constitution and by-laws, and, after they have been proved, if a member claims that there has been a change in them affecting his rights the burden is upon him to prove it.
2. **INSURANCE—*Benefit Society—Effort to Settle—Case at Bar.***—The evidence in the case at bar shows that sufficient efforts were made, without avail, to secure a settlement of the liability on the policy in suit from the order issuing it before resorting to the courts, and a sufficient compliance with the provisions of the policy requiring a presentation of the claim and the proof thereof to certain designated functionaries, and the exhaustion of all remedies within the order before taking any other proceedings to enforce payment.
3. **INSURANCE—*Benefit Society—Arrears for Dues—Forfeiture—Waiver—Case at Bar.***—The evidence in this case shows that at the time of the death of an assured he was in arrears for premiums due on his policy, which by the express terms of the policy worked a forfeiture and there is no sufficient proof of a waiver on the part of the company issuing the policy.
4. **APPEAL AND ERROR—*Decision by Trial Court Without Jury—Reversal by Appellate Court.***—Where an action is heard by the trial court, without the intervention of a jury, and its judgment is reversed by this court, such judgment will be entered here as the trial court ought to have rendered, just as is done where the cause is heard in the trial court on a demurrer to the evidence. No new trial is awarded.

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Error to a judgment of the Circuit Court of Elizabeth City county, in a proceeding by motion. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Jones & Woodward, for the plaintiff in error.

S. Gordan Cumming, for the defendants in error.

KEITH, P., delivered the opinion of the court.

Plaintiff in error, The United Moderns, a beneficial society, issued a policy of life insurance to Frederick G. Rathbun, for the benefit of his infant children, for the sum of \$1,000.

On becoming a member, as appears from the policy, Rathbun stipulated that he would "comply with all and singular of the Constitution, Laws and Regulations of this Order," and the policy further provided that "the member shall not be personally liable for dues or assessments, but a failure to pay shall forfeit all right to benefits as provided in the Constitution and laws aforesaid." The certificate of insurance also contained the following statement signed by Rathbun: "This certifies that I accept the within certificate and the benefits conferred, fully understanding and agreeing that the same is to be and remain a liability upon the order only upon condition:

"First. That the statements made by me in my application for membership and to the medical examiner are true;

"Second. That I pay or cause to be paid all assessments, dues or money payable to the order, promptly, on or before the day the same becomes delinquent.

"Third. That I fully comply with the Constitution, Laws and Regulations of the Order. The within certificate to be and remain null and void for and during any such failure or default upon my part, as aforesaid."

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Article 13, section 1 of the Constitution of the order provides: "The first monthly payment falls due on the date of the issuance of the beneficiary certificate, and thereafter one monthly payment shall fall due on the first day of each succeeding calendar month, and must be paid on or before the last day of the month in which it falls due, and no notice shall be required from the Order for such payment." And section 2, that "Members failing to make all payments as they become due, do elect, by reason of such failure, to terminate their membership in the Order, and shall thereupon stand suspended by the non-payment of the call, and, under the law, do elect and agree, by reason of such failure, not to hold the Order for any liability whatsoever, and do thereby surrender all rights as a beneficiary member; provided, that if the member is in good health and shall pay any past due payment within ninety days of the time it became due, together with all other payments that may have become due in the meantime, and shall also accompany his payment with his certificate that he is in good health, and the local financier shall remit such payment to the supreme recorder within fifteen days after receipt of same, his beneficiary certificate shall become reinstated from the date of payment, provided that the member is in fact in good health at the time, but the fact of payment and furnishing certificate shall not bind the Order unless the member was in fact in good health."

Just here it may be proper to notice an objection made by defendants in error to the proof of the constitution and by-laws, which is, that it does not appear that they were the constitution and by-laws in force at the time the certificate of membership was issued to the decedent.

The constitution and laws of the order were proved. The members are presumed to know the constitution and by-laws, and if a change had been made in them affecting the rights of defendants in error, the burden was upon them to introduce proof to that effect. *Greenleaf on Ev.* (15 Ed.), § 41.

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On the 14th of September, 1903, the insured died, and a demand having been made by the beneficiaries in the policy upon the association payment was refused upon the ground that the insured was not, at the time of his death, a member in good standing, but had forfeited his rights under the policy by failure to pay the premiums as they fell due. Thereupon suit was instituted by the beneficiaries by their next friend in the Circuit Court of Elizabeth City county, which terminated in a judgment against the plaintiff in error for the full amount of the policy, and to this judgment a writ of error was awarded by this court.

The first error assigned is that plaintiffs in the court below had not complied with the terms of the policy, which provides that "Every member and the beneficiary of every member shall before instituting any suit in the civil courts of the country against the order, first present their claims or contentions, together with the facts and proofs relied upon, to the proper officer, committee or authority of the order entitled to consider the same, and, in the event of an adverse ruling by any subordinate authority to which an exception is taken, shall exhaust all remedies within the order by appeal as a preliminary to any other proceedings."

We think the evidence shows a sufficient compliance with this provision, and that sufficient efforts to secure a settlement from the order without suit were made and proved unavailing; that the beneficiaries were justified in resorting to the courts for relief, and this assignment of error is therefore overruled.

It appears from the evidence that the insured was an organist in St. John's church, in the town of Hampton; that in the spring and summer of 1903 his health became impaired, and that he failed to pay certain assessments promptly, as they fell due; but that, upon the payment of the money and the production of a physician's certificate as to the condition of his health, he was reinstated, and continued to pay his dues, though at intervals he would fall a month or two behind, and would then be reinstated in accordance with the rules of the order.

About the middle of July he went to Lebanon, Ohio, and entered a sanatorium, the church of which he was the organist, in consideration of his long and faithful service in that capacity, agreeing to continue to him the payment of his salary.

The financial agent of the association mentioned to the rector of the church that there was a premium due on Rathbun's policy, and the rector told him that he knew Rathbun was sick, and that, being sick and having unusual expenses, he was in straits for money, but that the vestry of the church and he (the rector), personally, did not mean that this insurance should lapse; and thereupon the rector and the agent went to the treasurer of the church to make arrangements with respect to the payment of the dues. It seems that both the rector and the financial agent of the order looked upon the arrangement as a continuing one. The treasurer advanced the money, and put the slips or tickets which the agent of the order had brought with him into his private cash-drawer, and it appearing that the salary of Rathbun as organist had been paid up to the first of July, the treasurer carried the tickets over until the next payment.

On the 1st of August the treasurer of the church drew a check in favor of Mrs. Rathbun, mother of Mr. Frederick G. Rathbun, for the amount of his July salary, without reserving anything (as perhaps he should have done under the arrangement) for the payment of the premiums. To the little girl who carried the check to Rathbun's mother, he said: "Tell your grandmother that I hold certain slips for insurance of your father's and I suppose she wishes to cash them out of this check." In about an hour afterwards Mr. Rathbun, the father of the insured, came to the office, paid the money and took the slips away with him. On the 1st of September the treasurer paid the amount of the August salary.

Some time in August the financial agent of the order again came to the treasurer of the church to collect the assessments then due, in accordance with the arrangement before entered

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into. The treasurer told him that he had already sent a check to Mrs. Rathbun, the mother, and he had no doubt that if he would present the slips to her they would be paid, and asked him to see her. He said to the agent that if she did not pay them to come back and let him know and he would pay them. This the treasurer says was the substance of what occurred between them; that after Rathbun died some one said to him that they were sorry the insurance in the Moderns had lapsed, and he said he had attended to that—that "I told Mr. Guthrie to see Mrs. Rathbun and if she didn't pay it to come back to me, and he had never been back."

The financial agent went from the office of the treasurer to the home of Rathbun's mother, as he had been directed to do, to collect the premiums for July and August. The money was not paid, and the reason for it will fully appear from the testimony of the rector, who after Rathbun's death and burial had a conversation with the mother of the deceased, who said to him: "I was deceived in Fred's condition. He kept on writing that he was better, and when Mr. Guthrie came to me we were so hard up for money—Fred had written for money, and had said that he would be home in a few days." The rector stated that Rathbun wrote him the same kind of a letter—that he was improving; that he kept his mother in the dark, and she was under the impression that he was better; that "she thought it would be all right when Fred got home—he assured her he would be home in a few days—so she just let it slip. So that was her excuse for not doing what she knew she might have done—gone to Mr. Heffelfinger or come to me—if she had known her son was in danger."

The whole of the sad story may be summed up as follows:

The health of the insured failed, and he was compelled to go to a sanatorium. He fell in arrears in the payment of his dues and his friends undertook to make an arrangement by which his salary should be continued, and the premiums upon his insurance paid. The necessities of his family were urgent,

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and instead of reserving a part of his salary to meet the exigency, the whole of it was paid to his mother and father for the support of his infant children, in reliance upon the hope that his health being restored, he would soon be able to return, present the necessary certificate of a physician, as he had before done, pay the money, and be reinstated to his rights in the order. But these hopes were disappointed. He died, and, at the time of his death, as the proof shows, was delinquent in the payment of certain dues.

Granting that the financial agent had the power to bind the association to look to the treasurer of the church for the payment of the dues, it is plain that the departure from the agreement was not due to any fault on the part of the association. Indeed, it cannot be said that there was anything to censure in any one connected with the transaction. Had either the rector or the treasurer known the situation, it is certain that it would have been promptly relieved. The misfortune is due to the urgent needs of the mother who had the care of the infant children upon her hands, and who listened, as all of us do, to the delusive promises of hope. But the hard fact remains that at the time of his death Rathbun was in default in the payment of dues for July and August, and there is in our judgment no sufficient proof of waiver on the part of the company.

As was said in *Knights of Honor v. Oeters*, 95 Va. 610, 29 S. E. 322; "There can be no recovery on the certificate on his life which was payable only on condition of his being in good standing at the time of his death." And in the same case, speaking of benefit societies, it is said: "They are not organized for the purpose of making money, but for fraternal and benevolent objects. Their schemes of benevolence, by which they aim to provide benefits for their members in time of sickness, and indemnity to their families upon their death, cannot be maintained, unless the rules and regulations prescribed by their constitution and by-laws for the attainment of these

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objects are substantially upheld. This it should be the policy of the law and the aim of the courts to do. Otherwise, their schemes for furnishing to the working classes and men of moderate incomes a cheap and simple substitute for life insurance cannot be accomplished."

In Bacon on Benefit Societies, sec. 354, it is said: "If the policy is conditioned to be void if the stipulated premium be not paid at the appointed day, time is of the essence of the contract and if the premium be not paid the policy is void unless the condition be waived. A beneficiary takes the policy subject to the condition requiring prompt payment of premium, and no notice of lapse is necessary." See also sec. 355. *Metropolitan L. Ins. Co. v. Hall*, ante p. 572; 52 S. E. 345.

The case was submitted to the judge, without a jury. He passed both upon the law and upon the evidence; and it is heard before us as though there had been a demurrer to the evidence. It is our duty to enter such judgment as the Circuit Court should have rendered, and we are forced to the conclusion that there was no liability upon the plaintiff in error, and that the judgment should have been rendered in its favor.

Reversed.

Richmond.

NEWPORT NEWS PUBLISHING COMPANY V. BEAUMEISTER.

January 18, 1906.

1. **PLEADING—*Declaration—Sufficiency.***—If a declaration, when read as a whole, charges the defendant with a breach of duty to the plaintiff, and states the facts constituting the alleged cause of action with sufficient certainty to be understood by the defendant, the jury and the court, it is good. It is not necessary for a plaintiff to negative his own contributory negligence or defenses which may be set up by the defendant.
2. **PERSONAL INJURY—*Measure of Damages—"No Legal Limit"—Compensation.***—In an action to recover damages for a personal injury where the evidence does not warrant punitive damages, fair compensation for the injury suffered is the legal limit to the damages which a jury may award, and an instruction which tells the jury that there is "no legal limit" to the damages they may award for "personal injuries" and that they are judges of the extent of the damages which, from the evidence, the plaintiff is entitled to recover, not exceeding the amount claimed in the declaration, is misleading, and it is error to give it.
3. **MASTER AND SERVANT—*Safe Place—Supervision by Servant—Instructions—Partial View of Case—Case at Bar.***—The rule that it is the duty of the master to exercise ordinary care to provide the servant with a reasonably safe place in which to work, and to keep it so, does not apply where the injured servant is himself to perform the duty of keeping the place in such condition. In the case at bar the instruction given states the general rule, but makes no reference to the duty devolved upon the servant as disclosed by the evidence in the cause, nor to the evidence tending to show his contributory negligence, and hence was misleading and erroneous.
4. **INSTRUCTIONS—*Sufficiently Instructed.***—It is not error to refuse an instruction, though correct, where the ruling asked has already been fully and clearly covered by another instruction given.

Statement.

5. **MASTER AND SERVANT—*Obvious or Known Dangers—Unnecessary Exposure.***—An employee unnecessarily undertaking work in such a position that its performance is obviously dangerous, or known by him to be dangerous, when it could have been otherwise performed without danger, in a way well known to the employee, cannot recover of his employer for injuries occasioned thereby.
6. **MASTER AND SERVANT—*Probable and Possible Dangers—Case at Bar.***—A master is not an insurer of the safety of his servant. While it is his duty to anticipate and guard against consequences that may be reasonably expected to occur, he is not required to foresee and provide against that which reasonable and prudent men would not expect to happen. In the case at bar, while it was negligence on the part of the defendant to fail to restore an electric light in the pit under its printing press for the use of the plaintiff, its servant, yet the proximate cause of the plaintiff's injury was his own palpable negligence, and there can be no recovery.

Error to a judgment of the Circuit Court of the City of Newport News, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The facts sufficiently appear in the opinion of the court. Instruction T, referred to in the opinion is as follows:

"The court instructs the jury that it is the master's duty to exercise reasonable care, that is, such care as reasonable and prudent men use under like circumstances in providing safe and suitable appliances and instrumentalities for the work to be done, and in seeing that the place assigned to its servant to work is kept in a safe and suitable condition, and in providing generally for the safety of its servant in the course of the employment, regard being had to the work and the difficulties and dangers attending it. It is furthermore its duty to exercise like care not to expose its servant to risks beyond those incident to the employment, and such as were in contemplation at the time of the contract of service."

R. M. Lett and O. D. Batchelor, for the plaintiff in error.

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Wm. C. Stuart and Ashby & Read, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This is the sequel to the case of *Newport News Publishing Co. v. Beaumeister*, reported in 102 Va. 763, 47 S. E. 821. At the first trial there was a verdict and judgment for \$2,000 in favor of the plaintiff, which judgment, on a writ of error to this court, was reversed, and the case remanded for a new trial. At the second trial the plaintiff again prevailed, and recovered the judgment for \$4,500 now under review.

The declaration on which the first trial was had alleged that, in operating the printing press of the defendant company, it became necessary for the plaintiff to occasionally enter the pit under the press, in order to adjust certain parts of the machine; that it was the duty of the defendant company, in the exercise of reasonable care, to properly light the pit, so that the plaintiff might, with due caution on his part, perform his duties therein; that the defendant company failed to provide sufficient light in the pit for his safety, though it had promised to do so, and that, in reliance on such promise, plaintiff had continued in the defendant company's employment; that on the day of the accident it became necessary for him to go down in to the said pit to set some tapes on the said machine, and that after adjusting the same, and, while still in the pit, though the plaintiff was exercising due and proper care, his hair caught in the said machine, etc.

Recognizing that the evidence on the former trial showed that the plaintiff had accomplished with safety the purpose for which he went into the pit, when the case went back for a new trial his declaration was amended by inserting after "adjusting the same" (the tapes), the words "plaintiff recognized that there was a defect somewhere in the rollers, and in trying to locate the trouble, which was a necessary duty of the plaintiff."

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So that by the first declaration the duty which plaintiff claimed he was performing when injured was setting "some tapes," while by the amended declaration it was in trying to locate a trouble in the rollers.

To the amended declaration the defendant company demurred, which demurrer was overruled, and this ruling of the trial court is assigned as error.

The ground of the demurrer relied on is that the declaration, as amended, contains no allegation of necessity or duty on the part of the plaintiff to be under the press, while it was in operation, in his endeavor to locate a defect in the rollers.

We are of opinion that there is no merit in this contention. Enough has been said of the declaration to show that it does allege the duty on the part of the plaintiff to be under the press in his endeavor to locate the defect in the rollers, and when this allegation was read by the defendant company along with the other facts alleged, it could not fail to understand that the allegation meant that it was necessary for the plaintiff to be under the press, while it was in motion, in his endeavor to locate the defect in the rollers. It is not incumbent upon a plaintiff to aver that he has not been guilty of contributory negligence, nor is it necessary to negative defenses that may possibly be interposed. All that is required is that the declaration state the facts constituting the alleged cause of action with sufficient certainty to be understood by the defendant, who has to answer them; by the jury, who are to inquire into their truth; and by the court, which is to render judgment. In other words, if the declaration is sufficient to inform the defendant of the nature of the demand made against him, and states such facts as will enable the court to say that if the facts are proved as alleged they establish a good cause of action, it is sufficient. *Va., &c., Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991, and authorities cited.

We think the amended declaration measures up to the requirement of the rule adverted to, and that the demurrer thereto was properly overruled.

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The next error assigned is the action of the court in giving the following instruction for the plaintiff:

"The jury are instructed that there is no legal limit to the damages they may award for personal injuries, and that they are the judges of the extent of the damages which, from the evidence, the plaintiff may be entitled to recover, and, in estimating such damages, they may take into consideration his age, his station in life, his injury, his physical and mental suffering arising from said injury, his loss of wages for the time he has been prevented by said injuries from working, and a proper compensation for his being deprived by said injuries from following such calling or business as he could have followed but for said injuries, but the damages may not exceed \$10,000.00, the amount claimed in the declaration."

This is practically the same instruction on the measure of damages that came under review in *Norfolk, &c., Ry. Co. v. Marpole*, 97 Va. 599, 34 S. E. 462, where the objections made to the instruction were, (1) that it allowed the jury, without special proof, in fixing the plaintiff's damages, to take into consideration his mental suffering; and (2) that it intimated to the jury that they might award the sum of \$10,000, in the way of damages, without qualifying the statement by saying that this sum was only mentioned because it was the maximum amount claimed by the plaintiff.

This court was of opinion then, as it is now, that, in so far as it relates to the amount of damages that the jury might allow, the instruction is erroneous and calculated to mislead the jury; but as we could not see that it had probably done so in that case, and as the judgment of the Circuit Court had to be reversed on other grounds, we only took occasion in the opinion to comment on the instruction as follows: "We do not think that the instruction, as a whole misled or could have misled the jury in estimating plaintiff's damages, although it would have been better had the instruction simply told the jury that the plaintiff claimed ten thousand dollars and they were authorized to award such sum as the evidence justified, not exceeding that amount."

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The vital difference between that case and the case under consideration is that in the first-named there was nothing to indicate that the jury might have been misled by the instruction, while here the significant fact appears that at the first trial of the case, when the instruction in question was not given, the jury awarded the plaintiff \$2,000 damages, and at the second trial, with this instruction before the jury, he was awarded \$4,500.

It is not complained that the instruction specified in detail the possible injuries suffered by the plaintiff, to be considered in estimating his damages, but that it was misleading to tell them, in that connection, that there is no legal limit to the damages they might award. In other words that the instruction is misleading and calculated to misinform the jury that the law does not intend that a fair compensation for the injuries alone shall be given under the evidence, but that any amount named by the jury within the limit of damages claimed is the proper measure under the law. Counsel for the plaintiff cite a number of cases in support of their contention that this court has repeatedly sanctioned the expression in an instruction, "that there is no legal limit to the damages that the jury may award for personal injuries," but upon reference to those cases it will be seen that the question under consideration was whether or not the damages awarded were excessive, and not the question here under consideration. The expression is used in those cases, "there is no legal measure of damages," but in its use is to be found no sanction for an instruction in an action for personal injuries that admits of the interpretation, that there is no legal limit fixed by law to guide the jury in awarding damages other than the amount claimed in the declaration.

As was well said by Riely, J., in *Richmond Ry., &c., Co. v. Garthright*, 92 Va. 635, 24 S. E. 269, 32 L. R. A. 220, 53 Am. St. Rep. 839: "No method has yet been devised, nor scales adjusted, by which to measure or weigh and value in money the degrees of pain and anguish of a suffering human being,

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nor ever likely to be;" but it was not meant there, or by what has been said by this court in any other case, so far as we have been able to find, that juries are not to be, in cases like this, guided in arriving at the amount of damages, by a due and proper consideration of what would be a fair compensation for the injury suffered, and that fair compensation is not the legal limit to the damages which they may award.

As was said in the opinion by Joynes, J., in *Peshine v. Shep-person*, 17 Gratt. 484, 94 Am. Dec. 468: "When the trespass is committed without fraud, oppression or other special aggravation, the object of the law, it is generally said, is to give compensation for injury suffered, and damages are restricted to that object."

In this case there could be no recovery of exemplary or punitive damages, as a protection to the public, but only a suitable recompense for the injury sustained, and we are of opinion that the instruction under consideration was, in the form in which it was given, clearly misleading and should not have been given.

Instruction "T," given for the plaintiff, is also erroneous in view of the evidence in this case. The established rule is, that it is the master's duty to exercise ordinary care in seeing that the place assigned to his servant to work is kept in a reasonably safe and suitable condition, for in most cases the master cannot delegate that duty so as to relieve himself from liability. *N. & W. Ry. Co. v. Phillips*, 100 Va. 362, 41 S. E. 726. But that rule does not control where the person injured is himself to perform the duty of keeping the place where he is at work in a safe condition. *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614.

In this case it clearly appeared in the plaintiff's evidence, and in fact is admitted, that it was the duty of the plaintiff to keep the pit clear of the accumulation of paper that rendered his movements under the press more dangerous; while the instruction is not applied to the light alone, which it is alleged the defendant company had failed to furnish. It makes

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no reference whatever to this admitted fact, that the duty rested upon the plaintiff to prevent the accumulation of paper in the pit making his movements under the press more dangerous; and, therefore, the jury might have believed that the neglect of this duty on the part of the plaintiff contributed to his injury, and yet understood from the instruction that they should find in his favor because of the neglect of the defendant company to furnish a sufficient light at the pit.

But it is contended that the evidence does not show that the accumulated paper increased the plaintiff's danger in the pit, or that there was enough in there to warrant its removal; and, therefore, the instruction could not have prejudiced the defendant company. This, however, is not borne out by the record. There was evidence that with no accumulation of the paper in the pit, the plaintiff could have stood erect therein, and under the press, with a clear space of at least half an inch between the top of his head and the tapes in which his hair was caught, while with the accumulated paper under his feet he had to go to find out the trouble in the ink rollers stooping so low that he could see neither the tapes that caught his hair nor the ink rollers, and while in that position he happened to raise his head too high, resulting in his hair at the back part of his head being caught, causing him to throw up his hand to extricate himself, when it was caught in the machine and mashed. Under these circumstances, the instruction, in telling the jury the duty rested upon the defendant company to see that the place assigned to the plaintiff to work was kept in a safe and suitable condition, without any reference to the evidence tending to prove that it was his duty to keep the pit, in which he received his injuries, free from accumulated paper, or to the evidence tending to prove that this neglect of duty on his part contributed to the injury, was erroneous and well calculated to mislead the jury, and was not cured by any other instruction given.

The next assignment of error is to the refusal of the court

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to give Instruction No. 2, asked for by the defendant company. Its purpose was to tell the jury, that, if the point where the accident happened was so dark that plaintiff could not see the tape which caught his hair, or the cylinder which crushed his hand, even if he had been looking for them, he could not recover.

Instruction No. 7 contains the same proposition of law more clearly and fully expressed; therefore, the defendant company was not prejudiced by the refusal to give its instruction No. 2.

As has been stated, the former declaration alleged that plaintiff went down into the pit to adjust some tapes, and after adjusting the same, and while still in the pit, his hair was caught, etc., but did not say where he then was, or what he was doing. The amended declaration, upon which the last trial was had, alleges that after adjusting the tapes "plaintiff recognized that there was a defect somewhere in the rollers, and in trying to locate this trouble, which was a necessary duty of the plaintiff, his hair caught, etc." The issue under the declaration, as amended, was, therefore, not whether it was necessary for plaintiff to go into the pit while the machine was in operation, but whether, being already in the pit and having accomplished in safety the purpose for which he went in, it was necessary that he remain in there and keep the machine in operation while making the investigation of the rollers situated in the other end of the pit from where he adjusted the tapes, which he says he was making at the time of the accident.

To meet these new conditions, and in accordance with the views of this court when the case was here on the former writ of error, the evidence being directed mainly to this phase of the case, the defendant company asked for the following instruction, numbered 3: "An employee unnecessarily undertaking work in such a position that its performance is obviously dangerous, or known by him to be dangerous, when it could have been otherwise performed without danger, in a way well known to the employee, cannot recover for injuries occasioned thereby;

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and if the jury believe from the evidence that the investigation of the trouble with the ink rollers, which the plaintiff says he was making at the time of the injury, could have been made after first stopping the machine, or could have been made on the outside of the pit, then the jury must find for the defendant." This instruction was refused, the court giving in lieu thereof, with certain changes, instruction No. 6, refused at the last trial and ruled by this court to be correct, as the case stood at the former trial.

Instruction No. 3 contains a concise statement of the law of the case entirely applicable to the issue under the amended declaration and to the evidence bearing on that issue, while No. 6 given in its place required the jury to find, as a condition precedent to a verdict for the defendant company, that it was not necessary that the plaintiff should go into the pit while the machine was running, which was not in issue, the issue made under the amended declaration relating solely to the conduct of the plaintiff after going into the pit, wholly uninfluenced by anything that transpired prior thereto; for when plaintiff went in, and until he had finished adjusting the tapes which caused him to go in, he was ignorant of the trouble which he was endeavoring to remedy at the time of his injury. As was said by counsel for the defendant company, the necessary effect of directing the consideration of the jury to the necessity of going into the pit and the danger attendant thereon, was to divert their minds from the real issue—the prudence of plaintiff's conduct with relation to what transpired in the pit after adjusting the folding tapes—and to fix their attention on the prudence of the conduct of plaintiff in relation to the adjustment of the tapes, which was the real issue at the former trial before the declaration was amended, but which, under the amended declaration, had become a mere matter of inducement.

It was sought by instruction No. 3 to submit plainly and fairly to the jury the question, whether or not it was necessary

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to locate the defect in the ink rollers without first stopping the machine, unhampered and unincumbered by any issue concerning the tapes, such issue not being pertinent at this trial; and we are of opinion that it was error to refuse it and to give in its place instruction No. 6.

Instruction No. 3 having been refused, the defendant company's instruction No. 4, which stated, in different form, the proposition enunciated in No. 3, should have been given, but at another trial of the case it will not be necessary to give both.

We do not consider it necessary to pass upon the question presented in bill of exceptions No. 4, as it is not likely to arise at the next trial.

The remaining assignment of error is the refusal of the court to set aside the verdict of the jury and grant a new trial, on the ground that the verdict is contrary to the law and the evidence.

The plaintiff, has established the duty of the defendant company to provide the electric light alleged to have been necessary for use in examining and adjusting the machinery of the printing press in the pit, and its failure to do so, whereby the plaintiff would be entitled to recover damages in this action for the injuries he sustained, unless it appears from the evidence, viewed under the familiar rule governing its consideration, that his own negligence was the proximate cause of the injury, or contributed thereto.

The plaintiff was a man of experience, and had entire control of the printing press when he received the injuries for which he sues; and no one knew better than he the conditions surrounding, and the dangers confronting him when he attempted in the dark to locate the trouble in the ink rollers. As said in the opinion of this court (*Newport News, &c., Co. v. Beaumeister, supra*), the absence of the light increased the danger, and imposed upon the plaintiff enlarged obligations to exercise due care and caution in the performance of his duty. Notwithstanding the darkness and the promise of the master to

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repair the light, there was the absolutely safe way of repairing the defect in the machine, and the question arises, whether the plaintiff did not owe to his master, as well as to himself, the duty of adopting the method of doing the work, with respect to which there was no danger.

To meet the contention of the defendant company that the defect or trouble in the ink rollers, which the plaintiff says he was trying to detect when he was injured, could have been detected after the machine had been stopped, or from the outside of the pit, we have only his statement that it could not be done; but he states no facts to show this, and therefore what he says on that point is but an expression of an opinion. But were it conceded that he was right in the statement he makes, the question remains, was it necessary or his duty to expose himself to the known danger of going under the press in the dark to find the cause of the defect in the work he was doing, and which appears from his evidence to have been trivial?

It would serve no good purpose to review the evidence in detail. Leaving wholly out of view that part of it tending to prove that his neglect of duty in allowing the paper to accumulate in the bottom of the pit, in consequence of which he could not walk under the machine without stooping, and could not tell how near to the machine his head was when in that position, contributed to his injury, there is no getting away from the admissions he makes in giving his own evidence, that it was not safe in the pit under the machine at the west end, where he was, without a light; that he could not see the ink rollers he went to inspect and had to walk under and would not say that he could have seen his hand two inches before his face; that the trouble when located could not be remedied with the machine in motion; that he had to go in a stooping position when looking for it; and that in raising his head in passing under the ink rollers he was liable to come in contact with them. When asked, "Well, how could you calculate in the dark just how far you could raise your head without striking

them" (the rollers)? He answered: "I didn't know. I just stooped way low." His witness, Vaiden, also states that it was dangerous under the machine where the plaintiff was hurt without a light. The following questions and answers appear in plaintiff's own evidence: "Could you see the ink rollers at all?" Ans. "No, sir." "Was there light enough there, if you had looked, for you to have seen the tape which caught your hair?" Ans. "When?" "At the time your hair was caught or just prior thereto, if you had looked for the tape would you have seen it?" Ans. "No, sir." If the contention of his counsel, that he was speaking of not being able to see the tapes and ink rollers because of his stooping position, could be accepted, it would all the more show his recklessness in putting himself in that position.

There are times when an employee may incur extraordinary risks and not relieve his employer from liability for an injury he thereby sustains, as when it is necessary in order to save the lives of others, or to prevent injury to them, or to the employer's property, and perhaps other instances might be given; but that was not the situation when the plaintiff exposed himself on the occasion of his injury. No consequences of importance, certainly none serious, would have resulted if he had refused, as he should have done, to go to the dangerous place under the printing press, or had he pursued the absolutely safe course of stopping the machinery before attempting to detect and adjust the trouble in the ink rollers. It is true that he claims that he could not have detected the trouble in the ink rollers which caused the defect in the paper being printed, with the machine stopped, or from the outside of the pit; but it is also true, as shown by his own admissions, that he could not have discovered the trouble in the ink rollers in the darkness there, and therefore he needlessly and recklessly went into a place of danger to accomplish what, as he well knew, he could not accomplish without sufficient light. He undertook to enter a place where he had to go in a stooping position with his eyes

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down. If there had been a blaze of light, he could not have seen the ink rollers in that position. In undertaking to raise his eyes to look, he made the mistake of raising his head too high, resulting in the injury to him, for which, under the circumstances, his employer is not responsible.

It was said by Judge Cooley, in *Sjogren v. Hall*, 53 Mich. 274, 278, 18 N. W. 812, 814, quoted by Buchanan, J., with approval, in *Persinger v. Alleghany Ore, &c., Co.*, 102 Va. 354, 46 S. E. 326: "So far as there is a duty resting upon the proprietor in such cases, it is a duty to guard against probable damage; and it does not go to the extent of requiring him to render accidental injury impossible. . . . If the fact that prevention was possible is to render the employer liable, then he may as well be made an insurer of the safety of those in his service in express terms, for to all intents and purposes he would in law be insurer, whether nominally so or not."

The opinion in *Persinger v. Alleghany Ore, &c., Co. supra*, says: "It is right that the master should be required to anticipate and guard against consequences that may reasonably be expected to occur, but it would violate every principle of justice or law if he should be compelled to foresee and provide against that which reasonable and prudent men would not expect to happen." *Railroad v. McCormick, ante* p. 400, 51 S. E. 731.

In *Ches. & O. Ry. Co. v. Hafner's admr.*, 90 Va. 621, 19 S. E. 166, it was held, that the railroad company was not liable for the death of Hafner, who was struck by the fourth sill of a dangerously low bridge after he had passed in safety under the three first sills by stooping and lowering his head, when he had full knowledge of the dangerous character of the bridge, and the accident was due to his negligently raising his head too soon, his own negligence being the proximate cause of the injury. Discussing the evidence as to Hafner's conduct at the time of the accident, the opinion by Lacy, J., says: "He did

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not stoop low enough all the way under the bridge, but negligently raised his head too soon, and was struck; while others situated precisely as he was, did stoop low enough, and were unharmed. This was clearly contributory negligence on his part, which was the proximate cause of his injury and he cannot recover." . . . There the negligence charged was the keeping and maintaining a dangerously low bridge, under which the employees of the company had to pass in the discharge of their duties; but it was considered that while the company was, in this respect, negligent, the accident to Hafner, was due to his want of proper care for his own safety in passing under the bridge.

While it was negligence on the part of the defendant company not to restore the electric light for use under its printing-press, clearly the injury to plaintiff was not due to that negligence, but to his negligence in not exercising due care for his own safety when in a place of known danger, to the mistake of raising his head too high when he knew he was liable to come in contact with the machinery above him; an accident which the defendant company could not have foreseen as liable to happen, and provided against by the exercise of any sort of care on its part.

We are of opinion that the plaintiff's own palpable negligence was the proximate cause of his injury, and that the Circuit Court erred in not setting aside the verdict of the jury as contrary to the law and the evidence; therefore, its judgment must be reversed and annulled, the verdict of the jury set aside, and the cause remanded for a new trial.

Reversed.

Statement.

Richmond.

WINDER v. NOCK AND OTHERS.

January 18, 1906.

Absent, Cardwell, J.

1. TRUSTS AND TRUSTEES—*Duty of Trustees—Good Faith—Prudence—Case in Judgment.*—No liability attaches to a trustee who acts in good faith, within the scope of his powers and with the care of an ordinarily prudent man. In the case in judgment the whole matter of finding a purchaser and making a sale of a farm in which, or in the proceeds of the sale of which, appellant had an interest, was left exclusively in the hands of N., who had bought and paid the purchase price for the farm, and held the legal title thereto. The gravamen of the complaint against him is that the farm was sold for an inadequate price, and that this constituted a breach of trust, and was in fraud of appellant's rights. Upon an examination of the evidence, it is held that while N. did occupy a relation of trust to the complainant, he acted within the scope of his powers in making the sale, that the price obtained was fair and reasonable, that there was no direct proof of fraud on his part, and that appellant suffered no injury by such sale, and hence cannot recover.

Appeal from a decree in chancery of the Circuit Court of Northampton county. Decree in favor of defendants. Complainant appeals.

Affirmed.

The opinion states the case.

Wise & Watkins and *J. S. Parsons*, for the appellant.

Stewart K. Powell, Benj. Gunter, N. B. Westcott, Ashby & Read and *E. J. Spady*, for the appellees.

HARRISON, J., delivered the opinion of the court.

Mrs. John L. Winder, the wife of appellant, and Samuel P. Fisher, her son, by a former marriage, who together owned a farm in Northampton county containing 171- $\frac{1}{2}$ acres, sold and conveyed the same in May, 1902, to the appellee, L. Floyd Nock. For the part owned by Fisher, the appellee paid \$1,000 in cash, and for the part owned by Mrs. Winder he paid the sum of \$3,000 in cash. Contemporaneously with the deed from Mrs. Winder, the appellee and her husband, the appellant, made the following contract:

"This contract and agreement, made this 10th day of May, 1902, between L. Floyd Nock, of the first part, and John L. Winder, of the second part:

"Whereas, the said L. Floyd Nock did on the 5th day of May, 1902, purchase from Samuel P. Fisher and wife all of the said Samuel P.'s right, title, interest and estate in and to a tract of 85- $\frac{3}{4}$ acres, more or less, situated near Read's Wharf, Northampton county, Va., for the sum of one thousand dollars (\$1,000.00), and has this day purchased from Mrs. Rose A. Winder, wife of said John L. Winder (her husband), her tract of 85- $\frac{3}{4}$ acres, more or less, adjoining that purchased from the said Samuel P. Fisher and wife, and also her contingent interest in the said Samuel P. Fisher tract, together for the sum of three thousand dollars (\$3,000.00), to her in hand paid this day. And whereas the said sums of \$1,000.00 and \$3,000.00, respectively, were paid by the said L. Floyd Nock and the deeds for the said property were made to him, with the understanding and agreement between the said Nock and the said Winder that the said Winder is to be joint and equal owner in the proceeds of sale with the said Nock, subject to the aforesaid debt of four thousand dollars (\$4,000.00), the one-half of which amount, with interest on same from this day, is to be paid by said Winder to said Nock. And, whereas, the said Nock and said Winder are to share equally the rents and profits

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of said land, and the said Winder is to look after the property and collect the rents for which he is to receive a commission of ten (10) *per cent.* out of the gross amounts of rents received by him. And, whereas, the said Nock is to sell the property as soon as practicable for the best price possible, the same having been purchased for said purpose and for which, and making the financial arrangements he is to receive a commission of five (5) *per cent.* on the gross amount of sales, which as well as the cost of advertising is to be deducted before any division between said Nock and said Winder, and, whereas, the said Winder is to have the premises whitewashed and such other improvements made as he and said Nock may agree upon with a view of making the said premises attractive to a purchaser, and the labor and material is to be paid for by them jointly. Now this agreement witnesseth: That the said Nock and said Winder do each hereby bind himself to a faithful performance of the stipulations and agreements herein contained to be done and performed by them severally.

"Witness our hands and seals, this 10th day of May, 1902.

"L. FLOYD NOCK, (Seal).

"JOHN L. WINDER. (Seal).

"Witness:

J. H. NICHOLSON.

On the 1st day of July, 1902, the appellee, L. Floyd Nock, and his wife, sold and conveyed this farm to Francis H. Dryden, of Worcester county, Md., in consideration of \$4,300 cash. Contemporaneously with this deed the grantee therein executed a deed of trust to Nock, as trustee, securing \$4,000 to certain parties who had loaned the same to Dryden to enable him to pay the \$4,300 in cash to Nock for the farm.

In February, 1903, the bill in this cause was filed by John L. Winder, alleging that under the contract of May 10, 1902, he and the appellee, Nock, were jointly interested in the purchase that day made of the Fisher farm, and that appellee held the legal title thereto in trust for himself and appellant; that

Dryden, the purchaser had actual notice of the contract between himself and appellee, and was a mere pretended purchaser; that the sale by Nock was not *bona fide*, had been made without sufficient advertisement, at an inadequate price, and without the knowledge or consent of appellant, for the purpose of defrauding him of his just rights in the premises; and that Dryden participated in this purpose and intent. The prayer of the bill is that the deed from Nock and wife to Dryden, and the deed of trust from Dryden to Nock be set aside and annulled, and that Nock be required to account for the \$4,300 of purchase money received by him, and to pay the same to the beneficiaries under the deed of trust; that the farm be sold and the proceeds divided between Nock and himself, and that Nock and Dryden be required to account for rents.

The defendants, Nock and Dryden, filed separate answers to the bill, in which each denies every material allegation of the bill, especially denying that there was any collusion or fraudulent purpose connected with the sale, and declaring that it was in all respects *bona fide*, and for a full and adequate price.

From the decree of the Circuit Court dismissing the bill, this appeal has been taken; it being insisted that the sale by Nock to Dryden should be set aside upon the ground of breach of trust and fraud.

The claim of appellant, that Nock held the legal title to the farm in trust for the joint benefit of himself and appellant is most earnestly contested, it being insisted that, under the terms of the contract of May 10, 1902, appellant had no interest in the farm itself, and that his only interest was in the proceeds of sale in excess of the \$4,000 paid by Nock for the farm, and the cost of selling.

The contract is not clear upon this point, but in the view we take of the case it is immaterial whether appellant owned a joint interest in the farm, or only an equal interest with appellant in the proceeds of sale in excess of cost, for in either case Nock occupied the relation of trustee to Winder, and was bound to act in good faith in making the sale.

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The settled rule is that only the care of an ordinarily prudent business man is required of a trustee.

In *Minor's Institutes*, the learned author says: "It is indeed observable that whenever a fiduciary is called to account and a liability is sought to be fixed upon him, the enquiry must ever be, whether, in the transaction in question, he acted within the scope of his powers, with good faith and ordinary prudence. . . . This is, indeed, nothing more than the application of an old principle, which has long governed trusts of all kinds, namely, that nothing more should be required of a trustee than to act in good faith, and with the same prudence and discretion that a prudent man is wont to exercise in the management of his own affairs." 4 *Minor's Inst.* (3rd Ed.), 1482, 1495-6, citing numerous Virginia cases, and other authorities.

It is to be observed that the same contract which is relied on as creating this trust relation, reposed in Nock unrestrained power "to sell the property as soon as practicable for the best price possible, the same having been purchased for said purpose." There is no limitation as to the time of selling, except that it shall be sold *as soon as practicable*. There is no contract requirement as to the extent that the property should be advertised, nor is there any suggestion that appellant was to be notified or consulted with respect to the sale. The whole matter of finding a purchaser and making a sale was left exclusively in the hands of Nock. The gravamen of appellants complaint is that the farm was sold for an inadequate price, and that this constituted a breach of trust and was in fraud of appellant's rights. It is clear that unless this charge is well founded appellant has not been injured, and therefore cannot justly complain.

The evidence of value, as in most cases of this nature, is conflicting but a careful consideration of all the testimony leads to the conclusion that its decided weight is in favor of holding that the price obtained was the fair value of the property at the time the sale was made. Eleven witnesses on behalf of the

appellant fix the value of the farm at from \$5,500 to \$8,000. With much the larger proportion of these witnesses the estimate of value ranges from seven to eight thousand dollars. Sixteen witnesses, introduced on behalf of appellees, fix the value of the farm at from \$3,000 to \$5,000. Nearly all of these witnesses estimate the value of the farm at from \$3,000 to \$4,300. A careful scrutiny of the evidence shows very clearly that the witnesses who practically concur in the view that the price at which the farm was sold by the appellee, Nock, was its fair and reasonable value, have been longest and best acquainted with the land, and are better informed as to its value than those who speak on behalf of appellant. The record further shows that during the years from 1890 to 1902, inclusive, the latter being the year of the sale, the assessed value of the farm for purposes of taxation varied from \$1,990 to \$2,205. So that the farm was sold for about twice its assessed value. It is not likely that this land was assessed at one-fourth of its real value, which would be the case if the estimate of value placed upon it by appellant's witnesses was reliable.

Upon the whole case, we are of opinion that the appellee, Nock, acted within the scope of his powers in making the sale complained of; that \$4,300 was the fair and reasonable value of the farm in question; and that the appellant suffered no injury by its sale at that price. There is no direct proof in the record of any fraudulent intent on the part of the appellees, and in view of the conclusion that the appellant has not been prejudiced by the sale, we deem it unnecessary to comment upon the suggested suspicious circumstances attending the sale, for if the view of those circumstances taken by the appellant could be sustained, it would not affect the result.

For these reasons the decree complained of must be affirmed.

Affirmed.

Syllabus.

Richmond.

ALLISON'S EXECUTOR v. WOOD.

January 18, 1906.

Absent, Cardwell, J.

1. **APPEAL AND ERROR—Jurisdictional Limit—Change of Law before Appeal.**—A judgment for four hundred dollars was rendered by a Circuit Court in a contested action at law December 8, 1903, but the court did not adjourn till December 19, 1903. The statute reducing the minimum jurisdictional amount of this court in matters merely pecuniary became operative December 10, 1903. Acts, 1902-'3-'4, p. 590.

Held:

A writ of error lies to said judgment from this court. The judgment did not become final until after the statute became operative. Moreover the statute is remedial in its nature, and its language broad enough to cover judgments rendered before as well as after its passage, and the right of appeal depends upon the law in force at the time it is granted and not when the judgment was rendered.

2. **EVIDENCE—Presumption of Payment—How Repelled—Irregular Legal Proceedings.**—The presumption of payment arising from the lapse of time is a mere presumption of fact which may be repelled by proof of any facts and circumstances which reasonably tend to establish the improbability of payment. The record of an action at law and an ancillary attachment founded on a debt in which a personal judgment was taken against the defendant, without service of process, is legitimate evidence to repel the presumption of payment arising from mere lapse of time, although the personal judgment is a void judgment. Such evidence tends to show that the plaintiff had not abandoned his claim but had actively, though unsuccessfully, endeavored to collect it through the medium of the courts. The plaintiff should not be restricted to showing merely the issuing and levy of an execution on such judgment, but should be allowed to introduce the entire record.

3. EVIDENCE—*General Reputation—Particular Acts—Community Opinion.*—Evidence of particular opinions and particular acts is inadmissible to prove general reputation. Adequate knowledge of the prevailing opinion as to the possession of the characteristics sought to be established is an essential prerequisite to qualify a witness to testify as to general reputation on the subject.

Error to a judgment of the Circuit Court of Culpeper county, in an action of debt. Judgment for the defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

Barbour & Rixey, for the plaintiff in error.

Grimsley & Miller, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

On May 25, 1873, the defendant in error, Wood, executed a bond for \$140.00, payable one day after date to Allison, plaintiff in error's testator, at which time both the obligor and obligee resided in Washington county, Virginia. Allison died in the year 1879, and the same year Wood removed from Washington county and settled in the Valley of Virginia, where he remained until the year 1883 or 1884, when he became a resident of the State of North Carolina. After his removal to North Carolina it was his custom to make occasional trips to Virginia, varying from a week to a month in duration, for the purpose of dealing in live stock.

The bond was found among Allison's papers after his death, and in the year 1901 his executors, taking advantage of one of Wood's periodical visits to Virginia, instituted an action of debt thereon against him in the Circuit Court of Culpeper county. There was a verdict and judgment for the defendant, and the plaintiff brings error.

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We are met at the threshold of the inquiry by a motion to dismiss the writ of error on the ground that the sum in controversy is less than \$500, which, it is alleged, was the minimum amount of which this court had jurisdiction at the date of the judgment.

The judgment was rendered December 8, 1903, at which date the debt amounted to about \$400. Two days thereafter, on December 10, 1903, by an act of the General Assembly, which took affect from its passage, the jurisdiction of the court was enlarged so as to include cases in which the matter in controversy amounted to \$300, exclusive of costs. The Circuit Court adjourned for the term on December 19, 1903. The question to be determined, therefore, is, whether section 3455 of the Code (fixing the jurisdictional amount of this court at \$500, which was in force on December 8, 1903, when the judgment was rendered), or that section as amended (reducing the minimum jurisdictional sum to \$300, which became effective on December 10, 1903, two days after the judgment was rendered, but nine days before the court adjourned), is to govern the right of appeal in this instance.

The amended statute (Acts, 1902-3-4, p. 590—sec. 3455 Va. Code, 1904) provides, that "No petition shall be presented for an appeal from, or writ of error or supersedeas to, any final judgment, decree or order . . . which shall have been rendered more than one year before the petition is presented, . . . nor to a judgment, decree, or order of any court where the controversy is for a matter less in value or amount than three hundred dollars, exclusive of costs."

The act, it will be observed, deals with writs of error to *final judgments*, and by the rule of the common law no judgment becomes final until the end of the term at which it is rendered.

The rule is thus stated in the case of *Baker v. Swineford*, 97 Va. 112, 33 S. E. 542: "At common law no judgment became final until the end of the term at which it was rendered, regardless of the duration of the term, and until final

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no court could direct an execution to issue on it. Section 3600 of the Code, however, confers on courts authority to direct executions to issue on judgments under the conditions therein set forth, but such judgments do not thereby become final so as to deprive the court, during the term, of the power to correct, or if need be, annul them if erroneous."

It is true that for certain purposes a judgment takes effect from its date: e. g., it constitutes a lien on the real estate of the judgment debtor from that time (Va. Code, 1904, sec. 3567); and with respect to the limitation on appeals, this court, in accordance with the language of the statute, has held that time is to be computed from the date at which the judgment was rendered. *Buford v. North Roanoke Land Co.*, 94 Va. 616, 27 S. E. 509.

But a different principle obtains in determining the right of appeal. During the term of the court at which the judgment is rendered, the trial court is clothed with exclusive jurisdiction over it, and may, in its discretion, modify, amend or annul the same, and the jurisdiction of this court does not attach until after that jurisdiction of the trial court has terminated.

The due and orderly administration of justice demands the observance of the line of demarcation between the jurisdiction of trial courts and the jurisdiction of this court, and, in the absence of special statutory provision to the contrary, the jurisdiction of the former must cease before the jurisdiction of the latter accrues. The tendency of the rule is to prevent the confusion which might otherwise result from investing different tribunals with jurisdiction over the same subject at the same time.

But there is another quite sufficient reason why the right of appeal in this case is controlled by the amended act. The statute is remedial in its nature, and its language is sufficiently comprehensive to apply as well to judgments rendered before as to those rendered since its passage.

The rule of construction in such case is thus stated in 2 Cyc.,

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pp. 553-4: "Generally, a provision imposing a pecuniary limitation upon appellate jurisdiction, without an express exception made to exempt particular cases from its operation, applies to causes pending before the adoption of the provision, upon the principle that the right is a mere privilege and not a vested right. Even when judgment is rendered before the passage or taking effect of the act, the pecuniary provision applies if appellate proceedings have not already been instituted. But such general provision is not applicable to cases in which appeals have been perfected or writs of error sued out before the adoption or taking effect of the act."

See also *Idem*, p. 521, n. 92, where it is said, that the right of appeal depends upon the law in force at the time the appeal is granted, and not when the judgment was rendered.

That is the view taken by this court in the case of *McGruder v. Lyons*, 7 Gratt. 233, where it is held, that "the act of the Code limiting appeals to the Court of Appeals to \$200, applies to cases decided before the act went into effect, where the application for an appeal is made since." The case arose under Ch. 182, sec. 3, p. 683 of the Code of 1849, which, on the point involved, is substantially the same as the present statute. In construing it, Judge Allen observes: "The words are general, and as they merely apply to the remedy, they extend to and comprehend all petitions to this court, or a judge thereof in vacation, for an appeal, writ of error or supersedeas, whether the judgment, decree or order was prior to or after the 1st July, 1850, when the new Code took effect."

We are, therefore, of opinion that the objection to the jurisdiction of this court is not well taken.

On the merits, the defendant rested his case upon the presumption of payment from lapse of time. Whereupon, to repel that presumption, the plaintiff offered in evidence a copy of the record in an action at law, and an ancillary attachment proceeding, instituted in March, 1881, in the Circuit Court of Rockingham county, Virginia, against Wood, on the bond in

controversy, including the judgment erroneously rendered in behalf of the plaintiffs in that action, and sundry executions issued upon the judgment, which had been sent to various counties of the State in the effort to reach property of the defendant. But it appeared that the defendant was never legally served with process in the action, and upon that ground the court excluded the record, and would not suffer it to be read to the jury.

The evidence was not offered upon the hypothesis that the record was binding upon the defendant; but was intended, along with other circumstances, to exclude the conclusion that might be drawn from lapse of time unaccompanied by an effort on the part of the plaintiffs to enforce their demand, that they tacitly admitted payment of the bond.

Presumption of payment arising from lapse of time is a presumption only of fact, which may be repelled by evidence or circumstances tending to show non-payment; in which respect it differs from the bar created by the statute of limitations which is conclusive though the debt has not been paid. Upon such issue facts and circumstances which reasonably tend to establish improbability of payment are always admissible. Thus it has been held, "that the institution of legal proceedings, though irregular, by the creditor within the time relied on to raise the presumption of payment, would rebut such presumption which might otherwise have arisen." 22 Am. & Eng. Ency. of Law (2nd Ed.), p. 605.

The text is sustained by the following cases: *McCormick v. Eliot*, 43 Fed. 469; *Allen v. Sawtelle*, 7 Gray (Mass.) 165; *McCullough v. Montgomery*, 7 S. & R. (Pa.) 17; *James v. Jarrett*, 17 Pa. St., 370; *Palm v. Bushnell* (Sup. Ct. Spec. 7), 18 Civ. Pro. (N. Y.) 56, 13 N. Y. Supp. 785; *Wilson v. Pearson*, 102 N. C. 290, 9 S. E. 707.

But it is said, "such proceedings should not be allowed to

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have this effect if instituted for the sole purpose of repelling the presumption of payment, and not in good faith, with the sincere object of recovering the debt claimed." *James v. Jarrett, supra.*

The rejected record tended to rebut the presumption of payment by showing that the plaintiffs had not abandoned their claim, but had actively and persistently, though unsuccessfully, endeavored to collect it through the medium of the courts. It was, therefore, admissible, pertinent evidence for that purpose, and the Circuit Court erred in excluding it.

It is true that the court admitted testimony showing that an execution, issued on the void judgment, had been levied by the sheriff of Culpeper county upon cattle belonging to the defendant and found in that county, but that was only a link in the chain of testimony and did not cure the error complained of. The plaintiffs were entitled to submit the entire record, and not an isolated part of it, to the consideration of the jury.

The admission by the Circuit Court, over the objection of the plaintiffs, of the testimony of witnesses for the alleged purpose of proving the general reputation of the defendant for financial ability and promptness in meeting his obligations is also assigned as error.

The witnesses relied on for that purpose resided in Culpeper county, Virginia, and confessedly did not know the general reputation of the defendant in the community in the particulars referred to. The facts which the testimony tended to prove—that the defendant, during his periodical visits to Culpeper county, paid his hotel bills, drug bills and other incidental expenses—were plainly inadmissible to establish general reputation for financial standing and promptness in paying debts. The general reputation of the defendant in the community in regard to the possession of the characteristics attributed to him, was the ultimate fact to be established, and adequate knowledge of the prevailing opinion on the subject is a prerequisite to the admissibility of such evidence. The authorities are prac-

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tically agreed that evidence of particular opinions and particular acts is inadmissible to prove general reputation. See 16 Cyc. 1273, and note 89, where the subject is discussed and authorities cited. See also *Carter v. Com'th*, 2 Va. Cas. 169.

Tested by the foregoing principle, the evidence in question was inadmissible, and ought to have been excluded.

There were other assignments of error, but they need not be noticed as they involve questions not likely to arise on the next trial of the case.

The judgment of the Circuit Court must be reversed and annulled, the verdict of the jury set aside, and the case remanded for a new trial to be had not in conflict with this opinion.

Reversed.

Statement.

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HALL AND OTHERS V. HALL AND OTHERS.

January 18, 1906.

1. **EQUITY—Account of Debts—Issue as to Payment—Decree that Debt is Fraudulent—Matters outside of Issue.**—While the validity of any demand preferred against the estate of a decedent may be controverted without pleadings and in an informal way before the commissioner charged with taking a general account of indebtedness of the estate, still where no issue is raised by the pleadings, or upon the report of the commissioner, except as to the payment of a particular debt, it is not competent for the court to declare the debt fraudulent and without consideration. The creditor could not have anticipated such a defense, and has had no opportunity to contest it.
2. **EQUITY—Master's Report—Weight—Conflicting Evidence.**—Where a commissioner returns with his report, involving controverted questions of fact, the evidence upon which it is based, the court will, upon exceptions, review and weigh the evidence, and, if not satisfied with the commissioner's conclusion will over-rule his findings; but the report, except as to errors apparent on its face, is taken as *prima facie* correct, and, where the evidence is conflicting, this court will not disturb the action of the trial court in overruling exceptions thereto unless the findings of the commissioner are clearly erroneous.

Appeal from a decree of the Circuit Court of Buckingham county, confirming the report of a master in chancery disallowing a debt sought to be established by the appellants against the estate of Thomas S. Hall, deceased.

Reversed.

The opinion states the case.

Beasley & Moon, for the appellants.

Jno. R. Moss and S. S. P. Patteson, for the appellees.

WHITTLE, J., delivered the opinion of the court.

This is a suit in equity brought by appellants, who are heirs at law and distributees of Thomas S. Hall, deceased, against the other heirs and distributees, and the widow and administrator of the decedent, for the settlement of his estate.

The cause was referred to a commissioner in chancery to take the usual accounts; and, among other demands asserted against the estate, there were certain debts secured by a deed of trust due to William C. Hall, father of the grantor, Thomas S. Hall, deceased, and assigned by him to his grandchildren, who were the children of the said intestate.

The commissioner reported that these debts had been paid in full, and the appellants excepted. Subsequently, without passing upon the exceptions, the report was recommitted to the commissioner for supplemental inquiry; but no steps were taken before him upon the resubmission, and no further report was made with respect to the claims in question; but the parties took additional evidence elsewhere.

The cause was heard upon the report of the commissioner, the exceptions, and the depositions of witnesses; and the court passed the decree under review, which adjudged appellants' deed of trust and the debts secured "fraudulent and without consideration," and confirmed the report of the commissioner.

No issue was raised by the pleadings in regard to the deed of trust, and none upon the commissioner's report, save by the exception of appellants to the finding that the debts had been paid. Nevertheless, the court, by the decree complained of, rejected appellants' demand, on the theory that the deed of trust was "fraudulent and without consideration."

There is no warrant, under the equity practice which obtains in this jurisdiction, for such procedure. As observed, there was no issue made, either by the pleadings or before the commis-

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sioner, that the deed of trust was fraudulent, and the debts secured without consideration, and, consequently, appellants could not have anticipated such defense, and were afforded no opportunity to contest the grounds upon which the court rested its decree. It is settled practice in this class of cases that the validity of any demand preferred against the estate of a decedent may be controverted without pleadings and in an informal manner, before the commissioner to whom a general account of indebtedness of the estate is referred. *Conrad v. Fuller*, 93 Va. 16, 34 S. E. 893.

In that case, at page 20, the court says: "After a decree for a general account in a creditor's suit . . . all the other creditors may come in under the decree and prove their debts before the commissioner to whom the cause is referred. *Simmons v. Lyles*, 27 Gratt. 922, 929; *Piedmont, &c., Ins. Co. v. Maury*, 75 Va. 508; *Beverly v. Rhodes*, 86 Va. 415, 8 S.E. 572; 1 Bar. Chy. Pr. (2nd Ed.), 286, and *seq.* . . . The practice in some parts of the State, following the English rule, is to require the creditor coming in under a decree to prove a claim against the estate of a decedent to accompany it with an affidavit that the debt remains due. Such affidavit is not intended as evidence before the commissioner in proof of the debt, and must not be so considered. It puts the claimant upon his conscience as to the *bona fides* of his claim, and thus frequently protects the decedent's estate from paying debts which have already been paid. 2 Daniel's Chy. Pr. (5th Ed.) 1209; *Flading v. Winter*, 19 Vesey 199; *Morris v. Mowatt*, 4 Paige, 142."

In such case, however, the parties are given full opportunity to produce evidence for and against the debt, and to be heard before the commissioner, whose report upon exception is subject to review by the court. The principle is well settled, that where a commissioner returns with his report, involving controverted questions of fact, the evidence upon which it is based,

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the court will, upon exceptions, "review and weigh the evidence, and if not satisfied that the commissioner has reached a right conclusion will overrule his finding." *Shipman v. Fletcher*, 91 Va. 473, 22 S. E. 458.

But the report, except as to errors apparent on its face, is *prima facie* correct, and where the evidence is conflicting the appellate court will not reverse the action of the trial court overruling an exception to the report and confirming it, unless the findings of the commissioner are clearly erroneous. *Mad-dock's Admx. v. Skinker*, 93 Va. 479, 25 S. E. 535; *Triplett v. Woodward*, 98 Va. 187, 35 S. E. 455; *Kent v. Kent*, 2 Va. Cas. 674.

The exceptions to the report partake of the nature of special demurrers, and serve to direct the attention of the court, with reasonable certainty, to the specific points of controversy. *Robinet v. Robinett*, 92 Va. 124, 22 S. E. 856.

A comprehensive monographic note on the general subject of commissioners in chancery will be found appended to the case of *Whitehead's Admr. v. Whitehead*, 23 Gratt. (Va. Repp. Ann.), 554.

The evidence in this case has received careful consideration and fails to sustain any of the grounds of objection alleged against the validity of appellant's demand. Indeed, it was admitted by counsel for the appellees, in the argument of the case before us, that there was *no evidence* to justify the report of the commissioner, that the debts had been paid; and even if the question of fraud had been properly raised, the evidence is clearly insufficient to sustain it.

For these reasons, the decree of the Circuit Court must be reversed, and the cause remanded with directions that the deed of trust, so far as the debts of appellants are concerned, be established as a subsisting lien upon the real estate thereby conveyed, and for further proceedings to be had therein:

Reversed.

Syllabus.

Richmond.

THE AMERICAN TOBACCO COMPANY V. POLISCO.

January 18, 1906.

1. NEGLIGENCE—Driving on City Street—Lookout—Question for Jury.—

A driver of a vehicle on the streets of a city may reasonably expect to meet people, young and old, in the street or crossing the street, and it is his duty to keep a lookout for them in order to avoid injuring them. Whether or not an injury to a person on the street by colliding with such vehicle was proximately caused by the negligence of the driver in failing to keep a proper lookout is a question for the jury under proper instructions from the court.

2. NEGLIGENCE—Driving on City Street—Lookout—Negligence Per Se.—

In an action to recover damages for an injury inflicted on a young child by driving a wagon over it in the street, it is error to instruct the jury that if they believe from the evidence that at the time the child was struck and run over by the defendant's wagon the driver was looking at a punching bag on the side of the street and therefore did not see the child, then they must find for the plaintiff (child), as it takes away from the jury the consideration of other circumstances in the case, and tells them that the facts stated constitute such negligence as entitles the plaintiff to a verdict.

3. INSTRUCTIONS—Conflicting Instructions.—A defect in one instruction may be cured by a correct statement of the law in another where the court can see that, taking the instructions as a whole, the jury could not have been misled by the defect, but if two instructions are inconsistent and contradictory the verdict will be set aside as it is impossible to tell whether the jury was controlled by the good or the bad in arriving at a conclusion.**4. INSTRUCTIONS—Erroneous—Presumption of Prejudice.—**A misdirection or other mistake appearing in the record is presumed to have affected the verdict of the jury, and a judgment thereon will be reversed unless it plainly appears from the whole record that the error did not affect, and could not have affected, the verdict.

5. NEGLIGENCE—Contributory Negligence—Children—Avoiding Effect of Carelessness—Driving on City Street.—A child five years of age cannot be guilty of contributory negligence, and if, notwithstanding its carelessness, the driver of a vehicle in a city street could, by the exercise of reasonable care in keeping a lookout, have avoided coming in contact with and injuring it and failed to do so, his master is liable.

Error to a judgment of the Corporation Court of the city of Danville in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Peatross & Harris and *Cabell & Cabell*, for the plaintiff in error.

Harrison & Leigh and *Thos. F. Hamlin*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

Joseph Polisco, the father, and as the next friend of his infant daughter, Becky Polisco, a little over five years of age, brought this action against The American Tobacco Company to recover damages for injuries alleged to have been sustained by her in consequence of the carelessness and negligence of the driver of a wagon of the defendant company, passing over and along Craghead street in the city of Danville.

The trial in the lower court resulted in a verdict and judgment against the defendant company for \$1,800, which we are asked to review and reverse.

The declaration filed consists of two counts, in both of which the charge is made, that, at the time the vehicle he was driving ran over the child, the driver was looking to one side of the street where some persons were assembled witnessing others sporting with a punching bag at or near the sidewalk, and

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while the driver was thus looking to that side of the street, the child attempted to run across the street from the opposite side to her father's store, situated diagonally from the point at which she started and, not being observed by the driver, was struck and run over by the wagon, and sustained serious permanent injuries.

No attempt was made at the trial to show that the driver was not skilful, experienced, trustworthy and reliable, nor was there any evidence that he was driving rapidly or recklessly; so that his negligence, if any there was, consisted in looking to the side of the street where the group at the punching bag was, and not keeping a reasonably careful lookout along the street in front of the wagon.

The case does not belong to that class of cases to which *Persinger v. Coal Co.*, 102 Va. 350, 46 S. E. 325, and *Con. Brewing Co. v. Doyle*, 102 Va. 399, 46 S. E. 390, cited by counsel for plaintiff in error, belong, and which hold that a defendant is not liable for damages resulting from an event which was not expected, and could not have been anticipated by a person of ordinary prudence; but to that class which has dealt with similar occurrences to the one out of which this case arises, on the streets of populous cities, in which it has been uniformly maintained that on a street of a city a driver of a vehicle is held to reasonably expect to meet people, young and old, in the street or crossing the street, and the law requires him to keep a lookout for them in order to avoid injuring them, and not to turn aside and put his attention and sight on other objects; and that whether or not an injury to a person on the street by being run over by a vehicle passing thereon was proximately caused by the negligence of the driver in not keeping a proper lookout along the street in front of him, was a question for the jury. Among the cases last referred to are *Wiswell v. Doyle*, 160 Mass. 42, 35 N. E. 107, 39 Am. St. Rep. 457; *Kennedy v. Sullivan* (N. J.), 48 Atl. 535, 9 Am. Neg. Rep. 532; *McDon-*

nell v. Brewing Co. (N. Y.), 44 N. Y. Supp. 652, 2 Am. Neg. Rep. 423; *Nugent v. Metropolitan St. Ry.* (N. Y.), 61 N. Y. Supp. 476, 3 Am. Neg. Rep. 584; *Summers v. Bergner Brewing Co.*, 143 Pa. 114, 22 Atl. 707, 24 Am. St. Rep. 578; *Barnes v. S. City R.* (La.), 17 South. 782, 49 Am. St. Rep. 401; *Evers v. Phila. Tr. Co.*, 176 Pa. 376, 35 Atl. 140, 53 Am. St. Rep. 675.

It is, however, properly conceded in the argument here on behalf of plaintiff in error, that whether or not the conduct of its driver, and especially whether or not his looking to the side of the street at the group assembled at the punching bag, instead of looking steadily ahead, constituted actionable negligence, was a question for the jury to determine from the evidence under proper instructions from the court. Therefore, the only question for our determination is, whether or not the jury was properly instructed.

The trial court, on the motion of defendant in error, gave five instructions, to four of which—Nos. 1, 2, 4 and 5—plaintiff in error objected.

No. 1 is as follows: "The court instructs the jury that if they believe from the evidence that at the time the child, Becky Polisco, was struck and run over by defendant's wagon, defendant's driver was looking at the punching bag, and therefore did not see the child, then they must find for the plaintiff and assess her damages at such amount as the evidence warrants, not to exceed \$5,000.00."

It is admitted by counsel for defendant in error that this instruction, standing alone, may be too broad a statement of the law, but it is insisted that it is only an incomplete and not an erroneous instruction, the defects of which are covered by other instructions given.

It is true that the jury were in effect told in defendant in error's instructions Nos. 2, 4 and 5, not that the failure to look was carelessness, but that if he (the driver) negligently

failed to look, and negligently and carelessly drove on, and that he could, by the exercise of reasonable care, have seen the child, and could have avoided the accident, then they should find for the plaintiff.

We see no objection to these instructions, but they are plainly inconsistent with instruction No. 1, which erroneously took from the jury the consideration of other circumstances in the case, and told them that if they found from the evidence that the driver of the wagon was looking at the punching bag when the child was run over and injured, this was negligence that would justify their finding a verdict in her favor.

While instructions are to be read as a whole, and defects in one instruction may be cured by a correct statement of the law in another where the court considers that, taking the instructions as a whole, the defect could not have misled the jury; yet if two instructions are inconsistent and contradictory, the verdict will be set aside, as it is impossible to say whether the jury was controlled by the good or the bad in arriving at a conclusion. *Richmond Trac. Co. v. Hildebrand*, 99 Va. 48, 34 S. E. 888; *Wash., Alex. & Mt. V. Elec. Ry. Co. v. Quayle*, 95 Va. 741, 30 S. E. 391.

It is also well settled that a misdirection or other mistake of the court appearing in the record is to be presumed to have affected the jury, and the judgment will be reversed, unless it plainly appears from the whole record that the error did not affect, and could not have affected, their verdict. *Norfolk Ry., &c., Co. v. Corletto*, 100 Va. 353, 41 S. E. 740, and authorities cited. That, however, is not the case here, as it is impossible for this court to say whether the jury in finding their verdict were guided by the erroneous instruction No. 1, given for defendant in error, or by the other instructions given, and which were free from error. The jury might very well have regarded that it was unnecessary for them to consider the other instructions in the case, as they had been told in instruction No. 1 that if they believed from the evidence that it was a fact

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that the driver of the wagon was looking at the punching bag at the time the wagon struck and injured the child they should find a verdict in her favor, leaving out of view any other fact or circumstance which the evidence may have proved or tended to prove.

The refusal of the court to give plaintiff in error's instruction No. 10 is assigned as error. It is as follows: "The court instructs the jury that if they believe from the evidence that the child ran across the street and ran into the defendant's wagon, and that this was the proximate cause of the injury, then the plaintiff cannot recover under the allegation of negligence in the declaration."

Since the child could not, by reason of her age, be held guilty of contributory negligence, this instruction was too broad, and therefore misleading. She might have run across the street into the wagon, yet if the driver could by the exercise of reasonable care in keeping a lookout as to where he was driving, and what objects the wagon might come in contact with, have seen her, and thus avoided doing her damage, the plaintiff in error was liable for the injury, and the allegations of the declaration in the case were sufficient to warrant a recovery on that ground. The instruction was properly refused.

The circumstances which occasioned the asking by plaintiff in error of instruction No. 11, which was refused, are not likely to arise at the next trial of the case; therefore, it is unnecessary to consider the ruling of the court in refusing the instruction.

For the error in defendant in error's instruction No. 1, hereinbefore pointed out, the judgment complained of will be reversed and annulled, the verdict of the jury set aside, and the cause remanded for a new trial, to be had in accordance with the views expressed in this opinion.

Reversed.

Statement.

Richmond.

HOOPER AND OTHERS v. SAUNDERS.

January 18, 1906.

1. **STATUTES—Construction.**—In construing a statute it must be viewed as a whole, so as to make all of its parts harmonize, if practicable, and give a sensible and intelligent effect to each. It is not to be presumed that the Legislature intended any part of a statute to be without meaning.
2. **BILLS OF EXCEPTION—When to be Signed—Code, 1904, Sec. 3385.**—Under the provisions of Section 3385 of the Code of 1904, in the absence of any agreement between the parties, bills of exception can only be signed during the term at which the opinion of the court is announced to which exception is taken, or in the immediately succeeding vacation within thirty days after the end of that term. They cannot be signed during a succeeding term, nor during any other vacation than that immediately succeeding the term at which the objectionable opinion was announced. The beginning of a new term, although within the thirty days, puts an end to the court's jurisdiction to sign such bills.

Error to a judgment of the Corporation Court of the city of Newport News, in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Writ of error dismissed.

There was no agreement, of record, between the parties as to the time within which bills of exception might be signed.

O. D. Batchelor and W. R. Perkins, for the plaintiffs in error.

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Jeffries & Lawless, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

We are met at the threshold of this case with a question of jurisdiction.

The term of the Corporation Court of the city of Newport News, at which the final judgment complained of was rendered, adjourned on December 10, 1904. At that term certain exceptions were taken to the opinions of the court. The next succeeding term of the court began its session on December 12, 1904. The bills of exception, which were taken during the term at which the judgment was rendered, were not signed until January 7, 1905, which was during the vacation following the last mentioned term, which began on the 12th day of the preceding December.

Formerly, after the judgment became final by the adjournment of the court, jurisdiction over the case was lost, and with it the power of the court to sign the bills of exception. This rule was changed by statute approved December 31, 1903, which, so far as necessary to be quoted, is as follows:

"Any bill of exceptions may be tendered to the judge, and signed by him, either during the term at which the opinion of the court is announced, to which exception is taken, or in vacation, within thirty days after the end of such term, or at such other time as the parties, by consent entered of record, may agree upon, and any bill of exceptions so tendered, and signed by the judge as aforesaid, either in term-time or vacation, shall be a part of the record of the case." Va. Code, 1904, sec. 3385.

The plaintiff in error insists that the power to sign the bills of exception is not limited to the period of the vacation immediately following the term at which the final judgment was rendered, but it is by the terms of the statute extended to a period

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of thirty days after the end of such term. This construction would eliminate from the statute entirely the words "in vacation" and make it read, "Any bill of exceptions may be tendered to the judge, and signed by him, either during the term or within thirty days after the end of such term," etc.

If the Legislature had intended that the exceptant should have thirty days after the adjournment of the term, at which the final judgment was rendered, in which to have his bills of exception signed, although the vacation following such term did not last for thirty days, its purpose could have been easily accomplished, as already seen, by omitting from the statute the words "in vacation." Upon well settled principles, we are not at liberty to deal with the statute in the manner indicated. It is a familiar canon of construction that every part of an act must be given effect if it be possible. A statute must be viewed in connection with the whole, so as to make all of its parts harmonize, if practicable, and give a sensible, intelligent effect to each. It is not to be presumed that the Legislature intended any part of a statute to be without meaning. On the contrary, the presumption is, as well on the ground of good faith as on the ground that the Legislature would not do a vain thing, that it intends its acts and every part of them to be valid and capable of being carried into effect. Sutherland on Stat. Constr., ss. 325-331; Dwarris on Stat. Constr., pp. 188-189, 271; *Fox v. Com'th.*, 16 Gratt. 1; *Life Ins. Co. v. Cogbill*, 30 Gratt. 72-81.

It is clear from the statute that when the term has ended at which the final judgment was rendered, without the bills of exception being signed, such bills cannot then be signed except in vacation. This is imperative. The language of the statute is, "either during the term at which the opinion of the court is announced, to which exception is taken, or *in vacation*, within thirty days after the end of *such term*." The words "*such term*" clearly refer to the term at which the opinion was announced. Under the statute there are two limitations upon the time in

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which the bills of exception can be signed: First, it must be in vacation; and, second, it must be not later than thirty days after the adjournment of the term at which the opinion excepted to was announced. With most of our courts the vacations last longer than thirty days, and the purpose of the Legislature evidently was, where that was the case, to limit the time to thirty days; but in every case to limit the time in which bills of exception could be signed to the vacation following the term at which the final judgment was rendered.

The plaintiff in error seems to concede that the bills of exception can only be signed *in vacation*, after the adjournment of the term at which the opinion excepted to was announced, but contends that inasmuch as the signing in this case was within the thirty days limit the requirement of the statute is met, notwithstanding the fact that the signing was done during the vacation following the second term, which began December 12, 1904.

If this position were sound, the judge could, under the statute, notwithstanding the intervention of another term, sign the bill of exceptions during the vacation following such second term, or following any succeeding term, until thirty days had elapsed. As said by the learned counsel for the defendant in error, the court, as in this case, would have jurisdiction to sign the bills of exception for the first four or five days after it adjourned, then lose that jurisdiction during the succeeding term, and then, by the adjournment of that term regain its jurisdiction, have the case again in its breast, with the power to sign bills of exception restored, for the next five or six days, then lose jurisdiction again when another term began, and so on from term to term until thirty days had been accomplished. It can hardly be supposed that the Legislature intended such a result, or intended to suspend the benefits of the judgment thus indefinitely, while the judgment debtor was dallying with the question whether or not he would perfect his bills of exception.

We are of opinion that the statute gives the court power to

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retain the case for the purpose of signing bills of exception during the vacation immediately following the term at which the opinion excepted to was announced, and for thirty days after the adjournment of *such term*, if the vacation should last that long; but that the beginning of a new term, although within the thirty days, puts an end to the court's jurisdiction for that purpose, and it cannot afterwards be resumed.

It follows from what has been said that the Corporation Court of the city of Newport News was without jurisdiction to sign the bills of exception in this case after entering upon the new term which began December 12, 1904. The bills of exception are, therefore, not properly a part of the record before us, and for this reason the writ of error must be dismissed as improvidently awarded.

Dismissed.

Syllabus.

Richmond.**CHESAPEAKE & OHIO RAILWAY COMPANY v. BEASLEY,
COUCH & COMPANY.**

January 18, 1906.

1. **COMMON CARRIERS—Liability for Baggage—Reasonable Time to Remove.**—A common carrier of passengers is an insurer of its passengers' baggage during transportation, and for such a time thereafter as affords the passenger a reasonable opportunity to remove it. What is such reasonable time depends upon the circumstances of the particular case, such as the character of the station, the opportunities afforded for delivering such baggage when called for, and the like. From this duty to safely carry and deliver the common carrier can only be exonerated by the act of God or a public enemy. In the case at bar, a reasonable opportunity was not afforded the passenger to remove his baggage.
2. **COMMON CARRIER—Contracts Against Negligence—Limiting Liability—Case at Bar—Agreed Valuation of Baggage.**—A contract with a common carrier whereby, in consideration of a reduced rate, a shipper agrees to accept an agreed value, less than the true value, of goods lost by the negligence of the carrier is invalid in this State, where it is declared by statute that "no agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid." To limit is simply to exempt *pro tanto*, and hence is alike forbidden. It is immaterial that the contract was fairly entered into for a valuable consideration. It is void, not because it is unreasonable, but because the Legislature has declared all such contracts invalid, whether reasonable or unreasonable. In the case at bar, a passenger was traveling on a mileage ticket purchased at a reduced price, and signed a contract providing that in case of loss or damage to baggage no claim should be made therefor in excess of \$100. Baggage worth \$600 was lost through the negligence of the carrier, and it was held liable for the full amount.

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Error to a judgment of the Circuit Court of Botetourt county in an action of trespass on the case. Judgment for the plaintiffs. Defendant assigns error.

Affirmed.

The opinion states the case.

Robert L. Parrish, for the plaintiff in error.

Benjamin Haden, for the defendants in error.

KEITH, P., delivered the opinion of the court.

On March 1, 1903, H. A. Dudley, a traveling salesman representing the defendant in error, purchased of plaintiff in error a one-thousand-mile ticket, upon which he was entitled to travel in the passenger trains of plaintiff in error, and to carry with him free of charge one hundred and fifty pounds of baggage. The price of this ticket was one-half a cent per mile less than the regular fare, and in consideration of this reduced charge, Dudley signed a contract on the back of the ticket, which provides, in part, as follows: "That in the event of loss or damage to baggage, no claim shall be made therefor in excess of \$100.00."

On February 1, 1904, Dudley had three trunks, weighing six hundred pounds, checked on this ticket at Buena Vista, in Rockbridge county, to Eagle Mountain station, in Botetourt county, paying ninety cents for the baggage in excess of one hundred and fifty pounds. The train reached Eagle Mountain station about twenty-five minutes after seven in the evening. Dudley went to a hotel, and his baggage was taken by the agents of the railroad company to its baggage room to be weighed. About an hour after the arrival of the train, the agent closed the station, locked up the baggage, and went home. Shortly after midnight the station was consumed by fire, and the baggage destroyed.

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This suit was brought by the defendant in error, as assignee of H. A. Dudley, to recover damages for the destruction of the three trunks, which contained sample goods. Upon a demurrer to the evidence by the defendant company, judgment was given by the Circuit Court in favor of the plaintiff for \$605.42, the amount ascertained by the verdict of the jury to be the value of the plaintiff's goods.

The first contention of plaintiff in error is that the fire resulted from no negligence on its part, and that its liability was not that of a common carrier but a warehouseman.

A common carrier is an insurer of the goods it undertakes to carry for hire, and is bound to deliver the same safely; and from this duty can only be exonerated by the act of God or of a public enemy. A carrier's liability, as such, for a passenger's baggage continues during transportation, and for such a time thereafter as affords the passenger a reasonable opportunity to remove it. In determining what is a reasonable time for removing the baggage after reaching its destination, the peculiar circumstances surrounding each case must be looked to, such as the character of the station, the opportunities afforded by the common carrier for delivering baggage when called for, etc. *Penn. Co. v. Liveright* (Ind. App.), 41 N. E.; *Wald v. L. E. & St. L. R. Co.*, 92 Ky. 645, 18 S. W. 650, 58 Am. & Eng. Ry. Cas. 123; *Mote v. Chicago, &c., R. Co.*, 27 Iowa 22, 1 Am. R. 212; *Roth v. R. Co.*, 34 N. Y. 548, 90 Am. Dec. 736; *Burnell v. Ry. Co.*, 45 N. Y. 184, 6 Am. Rep. 61.

The record shows that the weather on the night in question was unusually severe. The station was so situated and blocked with freight cars as to make it practically impossible to deliver the trunks that night. The agent testifies that after the train left he first put away his express; that then he would weigh the trunks before allowing them to be removed; that he left the station in about an hour after the train arrived, locking the trunks up in the baggage room, and went to his home; and that he would not have returned that night for any cause less

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than fire. He says that if the trunks had been demanded before he left the station they would have been delivered, but further says that there were only two ways in which the trunks could have been removed, one by taking them out on the railroad track and wheeling them down, which he says a reasonable man would hardly have attempted, and the other was to break the seal of a loaded freight car and make a passage-way through it; that this last was the only practicable way in which the trunks could have been gotten from the depot and delivered that night; that the station hands had gone away some little time before he left, and that the trunks could not then be removed. He further says that Dudley was not informed that the trunks could be removed by opening the sealed and loaded freight car and taking them through it; and that appearances were such as to justify him in believing that they could not have been gotten out of the depot in that way.

We are of opinion, upon the whole evidence, that Dudley was not afforded a reasonable opportunity to remove his baggage on the night of his arrival at Eagle Mountain. Indeed, it is quite clear that the railroad company did not contemplate the removal of the baggage that night.

The second assignment of error is to the action of the Circuit Court in giving judgment in favor of the defendant in error for \$605.42, with interest, the amount ascertained by the jury to be the value of the three trunks and their contents, instead of \$100.00, the amount agreed upon, as shown by the contract, in the event of loss or damage to the baggage; the language of the fourth clause of the contract being, in part, as already seen as follows: "That in the event of loss or damage to baggage, no claim shall be made therefor in excess of \$100.00."

The decision of this question involves the construction of our statute upon the subject.

When the mileage ticket which contains this contract was purchased, section 1296 of the Code of Virginia of 1887 was in force. It declared that, "no agreement made by a common

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carrier for exemption from liability for injury or loss occasioned by his own neglect or misconduct, shall be valid." The law in force on February 1, 1904, when Dudley took passage upon this ticket, was passed on January 18, 1904, and is found in Va. Code, 1904, sub-section 25 of section 1294c, which reads as follows: "No agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid;" language which is similar to, but not wholly identical with section 1296 of the Code of 1887, in place of which it stands.

In *Richmond & Danville R. Co. v. Payne*, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849, this subject was under consideration, and it was said: "There is no doubt that a common carrier cannot lawfully stipulate for exemption from liability for the consequences of his own negligence or that of his servants. This was decided in an elaborate opinion by the Supreme Court of the United States in *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, and by this court in *Railroad Co. v. Sayers*, 26 Gratt. 328; and the principle is now brought into the Code, sec. 1296 of which declares that 'no agreement made by a common carrier for exemption from liability for injury or loss occasioned by his own neglect or misconduct shall be valid.'

"But that is not the question before us. The question here is whether, when the shipper signs a bill of lading, not exempting the carrier from liability for the negligence of himself or his servants, but *limiting* the amount in which the carrier shall be liable, in consideration of the goods being carried at reduced rates, such a contract, fairly entered into, is valid and binding; and we see no reason why, when its terms are just and reasonable, it should not be. The test to be applied in all such cases is, was the contract fairly entered into, and are its terms just and reasonable?

"At common law, it is true, the carrier is chargeable as an insurer, unless loss or damage occur by the act of God, or the public enemy. But as the law now is, he may, by special con-

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tract, restrict his liability for losses otherwise occurring. Indeed, he may by such agreement exempt himself absolutely from any liability for damage not caused by the negligence or default of himself or his servants. And the owner and shipper, by entering into the contract, 'virtually agrees that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment, but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence.'” In support of these propositions the court cites *New Jersey Steam Nav. Co. v. Merchant's Bank*, 6 How. 344, 12 L. Ed. 465; 2 Pars. Cont. (6th Ed.), 233; *Nicholson v. Wilson*, 5 East. 507, where Lord Ellenborough remarked, that there is no case to be met with in the books in which the right of a carrier thus to limit, by special contract, his own responsibility has ever been, by express decision, denied; and *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556. The opinion then goes on to say, that “the leading case on the subject is *Hart v. Pennsylvania Railroad Co.*, 112 U. S. 331, 28 L. Ed. 717, 5 Sup. Ct. 151, in which it was decided that where a contract of carriage, signed by the shipper, is fairly made with a railroad company, agreeing on a valuation of the property to be transported, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. ‘The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have

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no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.' "

It is to be observed that in *Hart v. Pennsylvania Railroad Co.*, *supra*, which seems to have controlled the decision in *R. & D. R. Co. v. Payne*, *supra*, there was no statute involved; while with us the statute expressly declares that a contract by which a common carrier undertakes to "exempt" itself from liability for injury or loss occasioned by its own neglect or misconduct, is void. The decision of this case must depend upon the meaning to be attributed to the word "exempt" in our statute.

If the carrier may limit its liability, though disabled by statute from exempting itself from liability, then the act of the Legislature is of little worth. The common law imposes upon railroad companies, as common carriers, the obligation to pay in full for property lost by them, which they have undertaken to transport, or damages to the extent of any injury which such property may have sustained. *St. Louis Ry. Co. v. Sherlock* (Kan. Sup.), 51 Pac. 899.

It is conceded that a contract though resting upon a consideration mutually agreed upon between the parties and fairly entered into—would be void if it exempted the carrier from all liability. The value of the property lost in this case is fixed by the verdict of the jury at something more than six hundred dollars; the recovery is limited by the contract to \$100. The common law liability, therefore of the carrier, is by virtue of this contract, if it be sustained, effaced and obliterated to the

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extent of \$500, or five-sixths, the value of the property. It seems to us that to the extent to which the carrier is relieved from liability which the law would otherwise have imposed upon it, it is to be considered and treated as having undertaken to exempt itself, by force of its contract.

But it is said the limitation must be a reasonable one. If, in the teeth of the statute, we are permitted to indulge in argument or conjecture as to what is in a particular case reasonable, where would the line be drawn? In the case before us the recovery is diminished from six hundred dollars to one hundred dollars. Is that the limit of reasonableness? By what standard is five-sixths of the valuation determined upon as a reasonable limitation or restriction? Could not the estoppel upon the conscience of the shipper be urged with as much force if the value of the goods had been fixed by the contract at fifty or twenty dollars? It would still have been an agreement between parties capable of contracting, fairly entered into, and for a valuable consideration. It is void, not because it is unreasonable, but because the Legislature has seen fit to declare that all such contracts, whether reasonable or unreasonable, are invalid.

We do not perceive the force of the reasoning which would give operation and validity, by way of estoppel, to a contract which the law-making power has declared to be void as repugnant to public policy. In the case of *Hart v. Penna. R. Co.*, *supra*, there was, as we have said, no statute affecting the contract. We do not believe that the Legislature, in passing the statute, either as it appears in the Code of 1887, or in that of 1904, meant to strike at contracts which exempt from liability, and leave untouched and in full force those which by limitation and restriction accomplish substantially the same purpose. Experience has shown that the shipper does not stand upon an equal footing with the carrier. He is at a disadvantage in contracting with the carrier. This the Legislature well knew, and this was the evil which it intended to suppress. The statute was

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designed to go to the very root of the trouble, and to declare all such contracts invalid; and it was not contemplated, in our judgment, by the Legislature, that any such halting and half-hearted remedy should be applied to the situation as a prohibition upon contracts which exempt, while leaving the carrier free to impose such terms of restriction of liability as would still leave the shipper at its mercy.

In Page on Contracts, vol. 1, p. 567, it is said: "Under statutes forbidding carriers to limit their common law liability by contract, a limitation on the amount of damage is invalid. Under a statute forbidding a carrier to exempt himself by contract from his liability, the shipper is not bound by the value fixed by him, even if fixed too low in fraud of the railway company." In support of this, the case of *Lucas v. Ry.*, 112 Ia. 594, 84 N. W. 673, is cited.

The Iowa statute is almost identical with our own. It provides that no contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier which would exist had no contract, receipt, rule or regulation been made or entered into; a provision somewhat more elaborate, but in all essential respects identical with our own.

The syllabus of the Iowa case, *supra*, is as follows: "As the limitation, in a contract of shipment of a horse, of the carrier's liability to \$100, the 'released value of the horse' named in the contract, renders the contract void, under Code, section 2074, providing no contract shall exempt a railway from liability of a common carrier which would exist had no contract been made, fraud of the shipper in making representations to secure a cheaper rate of freight will not prevent his proving the full value of the horse."

This case is pertinent to the present discussion in two aspects. That statute of Iowa uses the word "exempt," as ours does, and yet the limitation by contract was held by the court to be in conflict with the statute and, therefore, invalid. In other words, the

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limitation, to the extent that it diminished the common law liability of the carrier, was treated as an exemption from liability, and "limit" and "exempt" were construed as words of synonymous meaning. In that case too it appears that so far from the court imputing validity to the contract by way of estoppel, it declares that the "fraud of the shipper in making representations to secure a cheaper rate of freight will not prevent his proving the full value of the horse." Such was the vigor of the statute that it served to destroy the contract, and the shipper was permitted to recover the full value of the property shipped, although a cheaper rate of freight had been secured by false representations upon his part.

In *Louisville, &c., R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311, a mare had been shipped without inquiry as to her value, and the shipper had received a receipt or contract which provided, in general terms, that in case of injury to any horse shipped under it for which the railroad company might be liable, the amount claimed should not exceed \$100. In construing this contract and passing upon its validity, the court said: "Manifestly the stipulation does not contemplate total exemption from liability; it only provides for partial or limited exemption. Upon that distinction the nice and important question arises, can a stipulation of the latter character stand before the law when one of the former kind cannot? Or, to state the same question differently, and so as to apply it more directly to the facts of this case, the rule of law being established, as we have seen it is, that the defendant company could not lawfully have contracted with the plaintiff that it would in no event be liable for any part of the value of the mare if lost or destroyed, can the limitation of its liability to \$100 be upheld in the courts, if it should appear that her death resulted from the negligence of the company, and that she was in fact worth eight times that amount, as the jury found her to be? We unhesitatingly answer, No. The carrier cannot by contract excuse itself from liability for the whole nor any part of a loss brought about

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by its negligence. To our minds it is perfectly clear that the two kinds of stipulation—that providing for total, and that providing for partial exemption from liability for the consequences of the carrier's negligence—stand upon the same ground and must be tested by the same principles. If one can be enforced the other can; if either be invalid, both must be held to be so, the same considerations of public policy operating in each case.

“With great deference for those who may differ with us, we think it entirely illogical and unreasonable to say that the carrier may not absolve itself from liability for the whole value of property lost or destroyed through its negligence, but that it may absolve itself from responsibility for one-half, three-fourths, seven-eighths, nine-tenths, or ninety-hundredths of the loss so occasioned. With great unanimity the authorities say it cannot do the former. If allowed to do the latter it may thereby substantially evade and nullify the law which says it shall not do the former, and in that way do indirectly what it is forbidden to do directly. We hold that it can do neither. The requirement of the law has ever been, and is now, that the common carrier shall be diligent and careful in the transportation of its freight, and public policy forbids that it shall throw off that obligation, whether by stipulation for exemption in whole or in part from the consequences of its negligent acts.”

The contract construed in that case is almost identical with the one before us. There was no statute and the court dealt with it as one controlled by the common law. The opinion is convincing, and is supported by numerous authorities. It would be easy to multiply adjudicated cases and text-writers treating “exemption” and “limitation” of liability as convertible terms. This will be apparent from an inspection of *Railroad Co. v. Sayers*, *supra*, and the authorities there cited.

We rest our conclusion upon the force of the statute law of the State. If the statute was meant to declare the common law, and to cover the whole subject embraced by the common law,

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then it cannot be doubted, we think, that the Legislature never intended to diminish the protection which the common law afforded to the shipper, and that interpretation must be given to the statute which makes it co-extensive with the common law. If, however, the statute was not intended to cover the whole subject, but merely to prohibit total exemption from liability, then the partial exemption, the restriction, the limitation upon liability, rests where it was at the common law.

It has been suggested that as the section under consideration has been, in substance, re-enacted since the decision in *R. & D. R. Co. v. Payne*, *supra*, the Legislature is to be deemed to have approved that decision. There would be more force in this position had that case turned upon an exposition of the statute; but it is plain from the opinion that the statute was introduced by way of recital, and that the controlling influence with the court in its conclusion was the case of *Hart v. Railroad Co.*, *supra*. In this view we are strengthened by the fact that in the petition for the writ of error in *Railroad Co. v. Payne*, no allusion is made to the statute, though it is adverted to in appellant's reply brief, and it is altogether probable that the court meant to adhere to the view entertained by it when *Melendy & Russell v. Barbour, Receiver*, 78 Va. 544, was decided. In that case the parties agreed that the carrier should not be liable under any circumstances, nor for any cause, beyond the sum of \$200, for injury to or loss of any animal carried pursuant to the agreement, although the actual value of that animal might exceed that amount. This limitation was earnestly insisted upon by the carrier, but was thought to be of so little force that it is not mentioned in the opinion of the court; and notwithstanding the contract limiting the value to \$200, the decree of the court below allowing the plaintiffs to recover \$1,000, was reversed in this court as inadequate, and the cause remanded to the Circuit Court with instructions to frame an issue and empanel a jury to try the question as to damages incurred by appellants through

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the negligence of the defendant company. It thus appears that the contract in that case was wholly disregarded, and the rights of the parties were fixed precisely as they would have been had there been no contract.

The conclusion of the whole matter may, in our view, be summed up as follows: At common law the carrier could not by contract limit or restrict his liability for injury or loss caused by the negligence of himself or his servants. The object of the Legislature was to give to this recognized common law principle the force of a statute; and it would indeed be a singular outcome of an effort on the part of the Legislature to give an added sanction to the common law, if by ingenious construction the power to limit should be deduced from the prohibition to exempt.

BUCHANAN, J., dissenting:

In so far as the opinion of the court overrules the decision in the case of *Richmond & Danville Railroad Co. v. Payne*, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849, I dissent from it.

It was held in that case that while section 1296 of the Code of 1887 did not permit a common carrier to *exempt* itself from liability for its own negligence, or the negligence of its servants, yet it did not prevent it from entering into a contract limiting the amount for which it should be liable, in consideration of the goods being carried at reduced rates, provided the contract was fairly entered into and its terms were just and reasonable.

Whatever may be thought of the correctness of that decision, the question decided is, in my judgment, no longer an open one in this State. That decision was made in January, 1890, nearly fifteen years ago. By an act approved January 18, 1904 (Acts, 1902-3-4, p. 968), the statute law of the State in reference to public service corporations was revised so as to conform to the provisions of the present Constitution of the State. Whilst many radical changes were made by the act, no alteration was

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made in the language of section 1296 of the Code of 1887, except to make it apply to all transportation companies, in performing their duties as common carriers; and, as amended, it was re-enacted as cl. 25 of ch. 3 of that act (p. 980), and now appears as cl. 25 of sec. 1294c of the Code of 1904.

It is a well settled rule of construction that when a foreign statute, which has been construed by the courts of that State, has been incorporated into the laws of this State, it must be presumed that the Legislature intended to adopt the interpretation placed upon the statute by the courts of the foreign State. *Doswell v. Buchanan*, 3 Leigh. 394, 410, 23 Am. Dec. 280; *Danville v. Pace*, 25 Gratt. 1, 5, 18 Am. Rep. 663; *N. & W. Ry. Co. v. O. D. Baggage Co.*, 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722; *N. & W. Ry. Co. v. Cheatwood's Admr.*, 103 Va. 356, 367, 49 S. E. 489.

If this be true of a foreign statute incorporated into our laws, it must *a fortiori* be true in the re-enactment of a statute which has been construed by this court.

In *Mangus v. McClelland*, 93 Va. 786, 789-90, 22 S. E. 364, 365, it was said, that "it was a familiar rule of construction, that where a statute has been construed by the courts, and is then re-enacted by the Legislature, the construction given it is presumed to be sanctioned by the Legislature, and thenceforth becomes obligatory upon the courts. See *Anable's Case*, 24 Gratt. 563, where this rule of construction was held to be binding upon courts even in criminal cases, and *a fortiori* it is binding upon them in civil cases." See also *Swift & Co. v. Wood*, 103 Va. 494, 496, 49 S. E. 643, where it is reiterated that such a construction is *obligatory* upon the courts.

In my humble judgment, the construction placed upon section 1296 of the Code of 1887, by this court in *R. & D. R. Co. v. Payne*, *supra*, is as much binding upon the courts since the re-enactment of that section as clause 25 of section 1294c of the Code of 1904, as if the Legislature had declared in the body of the statute that it should not be construed as prohibiting a com-

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mon carrier from entering into a contract limiting the amount of its liability in consideration of the goods being carried at reduced rates, provided the contract be fairly entered into and its terms be reasonable and just. To hold otherwise it seems to me, with all deference to the majority of the court is, not merely overruling a former decision of this court, but is repealing to that extent an act of the Legislature.

HARRISON, J., dissenting:

I concur in the view that the liability of the plaintiff in error, in this case, was that of a common carrier, and not that of a warehouseman. I am constrained, however, to dissent from the conclusion reached by a majority of the court, that the plaintiff in error was not entitled to limit its liability, in the event of loss or damage to baggage, in consideration of a reduced charge for transportation.

A common carrier cannot lawfully stipulate for *exemption* from liability for the consequence of its own negligence, or that of its servants. This is the common law doctrine, which has been more than once announced by this court. *Railroad Co. v. Sayers*, 26 Gratt. 328.

At the time of the purchase of the ticket here involved (March 1, 1903), this common law rule had been carried into section 1296 of the Code of 1887, which provides as follows: "No agreement made by a common carrier for exemption from liability for injury or loss occasioned by his own neglect or misconduct, shall be valid."

When the fire was first discovered, it was burning on the inside of the station building. Its origin does not clearly appear, but assuming that it was the result of negligence on the part of the agents of the defendant company, the question to be determined is, whether, in view of sec. 1296, *supra*, a common carrier can make a valid and binding contract, not *exempting* the carrier from liability for the negligence of itself or its servants, but *limiting* the amount in which the carrier shall be liable, in consideration of carriage at a reduced rate.

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This question was settled in this State by a well considered opinion, in which it is held that the statute was merely declaratory of the common law, and that such a contract fairly entered into is valid and binding, the court saying: "We see no reason why, when its terms are just and reasonable, it should not be. The test to be applied in all such cases is, was the contract fairly entered into, and are its terms just and reasonable?" *Richmond & D. R. Co. v. Payne*, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849.

In the case at bar, there is no question that the contract was fairly made, that Dudley secured a reduced charge for transportation, and that he signed the contract agreeing to a valuation of \$100.00 for any loss or damage to his baggage, in consideration of the reduced charge for travel.

The cases involving this question are numerous and conflicting, different rules prevailing in different States. In the *Payne Case*, *supra*, this court followed the view repeatedly announced by the Supreme Court of the United States. I think the weight of authority and the better reason is in favor of that rule. It rests upon the theory that the agreement to limit the liability, in consideration of a reduced charge, is nothing more than a contract in advance, by which the parties agree upon and fix the value of the thing transported so that the shipper cannot pay for shipping property of one value at a reduced rate and when loss occurs demand payment upon another and higher valuation. The traveler or the shipper has two courses open to him, either of which he has the free and untrammelled right to adopt. He can either pay the regular fare and carry his goods at an unlimited valuation; or he can pay the reduced charge and carry them at the valuation then agreed upon in consideration of such reduced cost of transportation. No reason is perceived why such a contract, fairly made, should not be valid and binding. It is not inconsistent with public policy. Indeed, it has been said that to permit a party to repudiate such

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a contract would be repugnant no less to public policy than to fair dealing. *Hart v. Penn. R. Co.*, 112 U. S. 331, 28 L. Ed. 717, 5 Sup. Ct. 151, and cases cited. The principle settled by this case has been followed in a number of subsequent decisions of the Supreme Court. See the more recent cases of *Chicago, &c., R. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. 289; *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 42 L. Ed. 1033, 18 Sup. Ct. 588; *Penn. R. Co. v. Hughes*, 191 U. S. 477, 48 L. Ed. 268, 24 Sup. Ct. 132, and the cases there cited.

Apart, however, from the merits of the question at issue, it is, in my opinion, upon well settled principles, beyond the reach of further judicial inquiry, so far as this jurisdiction is concerned. As already seen, this court in *Richmond & D. R. Co. v. Payne*, *supra*, construed section 1296 of the Code of 1887, holding that, notwithstanding the statute, a common carrier could *limit* its liability in consideration of reduced charges for transportation, if the contract was fairly entered into and its terms were just and reasonable. By act approved January 18, 1904, before this cause of action arose, section 1296 of the Code of 1887, was re-enacted by the Legislature, in practically the same words, as follows: "No agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid." Acts, 1902-3-4, p. 968; cl. 25, sec. 1294c, Va. Code, 1904. It has now been fifteen years since section 1296 of the Code of 1887, was construed in *R. & D. R. Co. v. Payne*, *supra*. During all of that time, although recently re-enacted by the Legislature, no change has been made in the statute which affects the interpretation then given to it.

In *Mangus v. McClelland*, 93 Va. 786, 22 S. E. 364, this court said: "It is a familiar rule of construction that, when a statute has been construed by the courts, and is then re-enacted by the Legislature, the construction given to it is presumed to be sanctioned by the Legislature, and thenceforth becomes obli-

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gatory upon the courts. See *Anable's Case*, 24 Gratt. 563, where this rule of construction was held to be binding upon courts even in a criminal case, and *a fortiori* is binding upon them in civil cases."

This doctrine has long been accepted and acted upon as settled law in this State, in those cases where foreign statutes are adopted by our Legislature, as well as where our own statutes are re-enacted. *Doswell v. Buchanan*, 3 Leigh. 394, 23 Am. Dec. 280; *Danville v. Pace*, 25 Gratt. 1, 18 Am. Rep. 663; *M. & W. Ry. Co. v. Old Dom. Bag. Co.*, 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722; *Swift & Co. v. Wood*, 103 Va. 496, 49 S. E. 643.

In the light of these authorities, I am of opinion that, whatever may be the view of this court upon the question involved, as an original proposition, it cannot now be re-opened. With full knowledge of the judicial interpretation given the statute, it has been accepted and acquiesced in for fifteen years, and now that it has been re-enacted, "the construction given to it is presumed to be sanctioned by the Legislature and has, therefore, become obligatory upon the courts."

For these reasons, I am of opinion that the judgment should be reversed.

Affirmed.

Richmond.**NORFOLK & WESTERN RAILWAY COMPANY v. GEE.**

January 18, 1906.

1. **TORTS—Concurrence of Wrong and Damage—Injury.**—Injury alone is not sufficient to support an action for damages arising from the alleged negligence of the defendant. There must be a concurrence of wrong and injury. If a person does an act which is not unlawful in itself he cannot be made liable in damages for the resulting injury unless he does the act at a time or in a manner, or under circumstances which will render him chargeable with a want of proper regard for the rights of others.
2. **NEGLIGENCE—Frightening Horses—How Charged in Declaration—Nature of Object—Railroads.**—In an action against a railroad company for negligently frightening plaintiff's horse at a public crossing, it is not sufficient to charge that the defendant negligently placed a hand-car with long projecting arms at or so near the crossing as to render it unsafe for the travelling public in vehicles drawn by horses to cross on the highway, and that, in consequence thereof, the plaintiff's horse took fright and caused the injury declared on in the declaration. Nor is a count good which makes similar charges and adds that defendant's servants, negligently hung wearing apparel and bright tin buckets on the arms of the hand-car, and that these objects caused the plaintiff's horse to take fright. In each instance it was necessary to aver that the hand-car was, under the circumstances stated, an object of such unusual or extraordinary appearance as to have a natural tendency to frighten horses of ordinary gentleness and training, although that was a question to be determined by the jury from all the circumstances of the case, under proper instructions from the court.
3. **RAILROADS—Public Crossing—Failure to Keep in Order—Resulting Damage—How Charged in Pleadings.**—A count in a declaration against a railway company which charges that the defendant failed to keep its right of way, at a public crossing where the al-

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leged injury is charged to have been inflicted, "sufficiently smooth and level to admit of safe and speedy travel over such crossing" as required by the statute, but on the contrary, through its negligence, the public road at the crossing, and within defendant's right of way, was rough, gullied and obstructed, and that, the plaintiff's horse becoming frightened, she was unable to control it as she could otherwise have done, and that the buggy in which she was riding was drawn by her horse with great violence against the crossing sign post of the defendant, the buggy broken, the plaintiff thrown out, and the injuries complained of inflicted, is bad on demurrer, because it fails to show the nature of the gullies and obstructions which it avers were in the highway, or how they prevented the plaintiff from controlling her horse, or such state of facts as show that the condition of the highway was the proximate cause of her injuries.

Error to a judgment of the Circuit Court of Nottoway county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Wm. Hodges Mann, for the plaintiff in error.

G. S. Wing, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

The first assignment of error is to the action of the court in not sustaining the defendant railway company's demurrer to each of the five counts of the plaintiff's declaration. The court sustained the demurrer to the first and fourth counts, but overruled it as to the others.

This action was instituted by the plaintiff to recover damages for injuries, caused by the alleged negligence of the railway company, received at a public crossing near Burkeville. The second count of the declaration avers that on the day of the injury the plaintiff was driving in a one-horse buggy along

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the public road where it crosses the track of the railway company, as she had the right to do; but "the defendant company had so carelessly and negligently performed the duties it owed to the traveler on the said highway at the crossing, that the said defendant company, or its servants and agents, had so heedlessly, carelessly and negligently placed a car with long arms projecting above the same, commonly known as a hand-car, at or so near said crossing as to render the said crossing unsafe for the traveling public along the said highway at said crossing when in vehicles to which horses were attached; of all of which the defendant company had notice." It further avers, that by reason of said negligence her horse took fright at the hand-car, and in shying to avoid the same, without fault on her part, the buggy was broken to pieces, and the plaintiff was thrown out with great violence, and the injuries complained of (which are set forth) inflicted.

The objection made to the declaration is that the averments of fact in the count do not show that the hand-car was an object so unusual or extraordinary as to have a natural tendency to frighten horses of ordinary gentleness and training.

Injury alone will not support an action of this kind; there must be a concurrence of wrong and injury. If a person does an act which is not unlawful in itself, he cannot be made liable in damages for resulting injury, unless he does the act at a time, or in a manner, or under circumstances, which will render him chargeable with a want of proper regard for the rights of others.

Mr. Elliot, in his work on Roads and Streets, sec. 616, (2nd Ed.) says, in discussing the liability of a municipality for injuries resulting to travelers from horses becoming frightened at objects on or near the highway, says, that "where a horse of ordinary gentleness becomes frightened at objects naturally calculated to frighten horses, which the corporation has negligently placed, or permitted to be placed, and remain, in the

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highway, and injury results without contributory negligence, the corporation will be liable therefor. This liability extends to objects on the margin of the highway and within its limits, although they may not be within the traveled path."

Judge Thompson, in his commentaries on the Law of Negligence, vol. 1, sec. 1257, says: "A person who negligently or unlawfully places or leaves on the highway an object which from its appearance is likely to frighten a horse of ordinary training and docility, is liable to a traveler for any damage which is the proximate result of the horse taking fright at such object." See also sections 1258 and 1259, 1 Shear. & Red. on Neg., 355.

In *Piollet v. Simmers*, 106 Pa. St., 51 Am. Rep. 496, where numerous cases are cited and the question quite fully discussed, the horse of a traveler took fright at a small barrel mounted on wheels, which the owners of the property through which the highway ran were using in whitewashing their fences, and which they moved from time to time as the work progressed. They left it standing covered over with a white cloth, and having a shovel projecting a short distance above the top, all day Sunday on one side of the beaten highway track. In an action for damages thus caused, it was held, that unless there was something of an unusual or extraordinary character in the structure and appearance of the apparatus, which would naturally tend to frighten horses of ordinary gentleness and training, it was not negligence to use it; and its reasonable use for no longer a time than was naturally required on the highway in whitewashing the fence of defendants would not subject them to liability, although some horses might and did take fright at seeing it.

If the rule stated in the authorities cited be correct as to objects on the highway, and we think it is, certainly no higher degree of care, if as high, should be required of a person placing or leaving near the highway, on his own premises, appliances in use thereon. The count under consideration does not show

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clearly whether the hand-car was on the highway or on the defendant company's own premises outside of the highway. Neither does it show that the hand-car was an object so unusual or extraordinary as to have a natural tendency to frighten horses of ordinary gentleness and training. While the question of whether or not the object is of that character is largely for the determination of the jury, from its nature, situation and other like circumstances, under proper instructions of the court, (*Elliot on Roads*, sec. 616; *Piollet v. Simmers*, *supra*,) a count is demurrable which fails to show that the object which it is averred frightened the horse was by its nature calculated to frighten horses of ordinary gentleness. *North Alabama Ry. Co. v. Sides* (Ala.), 26 South. 116; *Keeley Brewing Co. v. Parnin* (Ind. App.), 41 N. E. 471, 472.

The third count is substantially the same as the second, except that it makes the additional averment that the servants and agents of the defendant negligently hung wearing apparel and bright tin buckets on the arms of the hand-car, and that these objects caused the horse to take fright.

If that count had averred, in addition, that the hand-car with these objects upon it, was so unusual or extraordinary in appearance as to have a natural tendency to frighten horses of ordinary gentleness and training, it would, we think, have stated a good cause of action.

The negligence relied on in the fifth count is based on the failure of the defendant to keep its right of way at the crossing "sufficiently smooth and level to admit of safe and speedy travel over such crossing," as required by sec. 1096, Code of 1887, (cl. 39, sec. 1294d, Va. Code, 1904). The count avers that the public road on which the plaintiff was traveling was located prior to the building of the railway, and that it was the duty of the defendant company to keep the said crossing, to the full width of its right of way, sufficiently smooth and level to admit of safe and speedy travel; that on the day of the accident the defendant had not exercised ordinary care and prudence in complying with this duty, but on the contrary, through

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its negligence, the public road at the crossing, and within the defendant's right of way, was rough, gullied and obstructed; that the plaintiff in attempting to cross the defendant's track, on the day of the accident, as she had the right to do, her horse became alarmed at or near the crossing, and by reason of the negligence of the defendant in not exercising ordinary care to keep its right of way at that point sufficiently smooth to admit of safe and speedy travel, she was unable to control her horse as she could otherwise have done; that the buggy in which she was riding was drawn by her horse with great violence against the crossing sign-post of the defendant, the buggy broken to pieces, plaintiff thrown out of the buggy, and the injuries complained of inflicted.

Under the averments of this count, it was the duty of the defendant to keep its right of way at the crossing in the condition required by the statute, and if its failure to do so was the proximate cause of the plaintiff's injuries, then the defendant would be liable in damages therefor. But the count fails to show the nature of the gullies and obstructions which it avers were in the highway, or how they prevented the plaintiff from controlling her horse, or such a state of facts as show that the condition of the highway was the proximate cause of the plaintiff's injuries.

We are of opinion, therefore, that the Circuit Court erred in not sustaining the defendant's demurrer to the second, third, and fifth counts of the declaration, and that for this error its judgment must be reversed and the cause remanded, with leave to the plaintiff to amend her declaration, and for further proceedings not in conflict with the views expressed in this opinion.

Errors are assigned to the action of the court in giving and refusing certain instructions. As precisely the same questions involved in these instructions are not likely to arise upon the next trial, upon new and different pleadings, it is unnecessary to consider those assignments of error further than to say,

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that in so far as the action of the Circuit Court in giving and refusing instructions on the former trial are in conflict with the views expressed in this opinion in disposing of the demurrer to the declaration, it was erroneous.

Reversed.

Statement.

Richmond.

PENDLETON'S ADMINISTRATOR v. RICHMOND, FREDERICKSBURG
AND POTOMAC RAILROAD COMPANY.

January 18, 1906.

Absent, Cardwell, J.

1. DEATH BY WRONGFUL ACT—*Contributory Negligence of Deceased—Case at Bar.*—In this action, which was to recover damages for death by wrongful act, or neglect, conceding the negligence of the defendant, the plaintiff's intestate was guilty of contributory negligence which bars recovery. He was struck at a station by a train he intended to board. When last observed he was approaching the track diagonally. He was walking along with his head down, and seemingly in a state of abstraction. He knew the train was coming. He was going to meet it. It was plainly visible, and he had but to lift his eyes and it could have been seen and the accident have been avoided. He was a passenger and entitled to a high degree of care from the railroad company, but this did not relieve him from the duty of taking ordinary care for his own safety.

Error to a judgment of the Law and Equity Court of the city of Richmond, in an action of trespass on the case. Judgment for the defendant on a demurrer to the evidence. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Jno. A. Lamb and Meredith & Cocke, for the plaintiff in error.

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Leake & Carter, for the defendant in error.

KEITH, P., delivered the opinion of the court.

This action was instituted to recover damages for the death of Thomas C. Pendleton, who died from injuries received at the town of Ashland, Virginia, while crossing the track of the defendant in error in order to take a train to the city of Richmond.

Upon the trial, there was a demurrer to the evidence, and the judgment of the Law and Equity Court upon that demurrer was for the defendant.

The railroad tracks at Ashland run about north and south. There are three tracks, that on the west, over which trains pass moving to the south; immediately to the east of that track, one over which trains pass moving north; and still further to the east a sidetrack, which is next to the station-house.

The injury complained of occurred on the 15th of October, 1903, about ten o'clock in the evening. The train which caused the accident was about ten minutes late, and there is evidence which tends to prove (and which, upon the demurrer to the evidence, must be held to have proved) that the train was running at a greater rate of speed than that prescribed by the ordinance of the town of Ashland; that it gave no warning of its approach by blowing its whistle or ringing its bell; and that the headlight upon the engine was feeble and dim. The railroad company, under these circumstances, it may be conceded, would be liable for damages, unless it can be shown that its negligence was not the proximate cause of the injury inflicted upon plaintiffs intestate, but that he was guilty of contributory negligence.

The decedent, upon the night in question, was at the depot awaiting with others the approach of the southbound train, intending to take passage for Richmond. It was, as we have said, about ten minutes late; and when those who were wait-

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ing for it became aware of its approach, they left the depot, crossed the sidetrack, the northbound track, and the southbound track, in order to be in a position to board the train upon its arrival. Pendleton was somewhat in the rear of the party, and it appears from the testimony of eye-witnesses to the occurrence that when last seen he was between the two principal tracks, with one foot raised over the east rail of the southbound track, but whether with the intention of stepping forward or moving back the witness was unable to say. There was no obstruction to his view; the approaching train was plainly visible for a distance of not less than ——feet; and while the evidence shows that the headlight was an indifferent one, it also appears that the train could plainly be seen. The deceased when last observed was approaching the southbound track diagonally—that is to say, the track running north and south while he was moving toward the southwest. This is shown by the testimony and by the injuries which he received, which were upon the right side and shoulder, and to the rear. It appears that he was walking along with his head down, and seemingly in a state of abstraction. He knew the train was coming. He was going to meet it. It was plainly visible. He had but to lift his eyes and it could have been seen and the accident have been avoided.

It was earnestly argued that his attention had been disarmed and his vigilance lulled to sleep by a colored man in the employment of the railroad, with whom he had conversed as to the train, its detention and probable time of its arrival. The duty of this employee was to take the mail-bag, carry it across the tracks and put it upon the train, and when the southbound train approached, he with others passed in safety from the depot, and the decedent following this employee and others who were, like himself, intending to take passage upon the train, received the injuries of which he died.

These seem to us to be the controlling facts. There is much other evidence in the case, but it was introduced to prove the

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negligence of the road, which is conceded, or circumstances which we deem to be immaterial. The controlling facts in the situation are, that this unfortunate young man, who was entirely familiar with the locality, with the position of the tracks, and with the approach of the train, undertook to pass where others had passed in safety, and taking no thought for his own protection, walked heedlessly into the peril which he could so easily have avoided.

We have frequently held that when the question arises on a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury; that the inference to be drawn from the evidence must be either certain and incontrovertible, or it cannot be decided by the court; and that negligence cannot be conclusively established by a state of facts upon which fair-minded men will differ.

This case is so plain as to its facts that there can be no diversity of opinion as to them, and there is as little difficulty about the law. The deceased is to be regarded as a passenger and entitled to that high degree of care for his protection which is due from a common carrier of passengers; but this did not relieve him from the duty of exercising ordinary care for his own safety, and this it is manifest he did not do.

We are of opinion that there is no error in the judgment complained of, which is affirmed.

Affirmed.

Syllabus.

Richmond.

STOKES' ADMINISTRATRIX v. SOUTHERN RAILWAY COMPANY.

January 18, 1906.

Absent, Cardwell, J.

1. EVIDENCE—*Admissibility—Speed of Trains—Improper Test.*—In order to show the speed at which a passenger train was running which collided with a wagon and team at a public crossing, causing the injury complained of, or the distance at which an approaching train could be seen from the public road by one in a wagon, or the time required by an ordinary team to pass over the track, it is not admissible to introduce the observations of a witness made more than thirty years before of a wagon and team going over the same crossing in front of a freight train, nor to prove the time it required a different wagon and team to go over the same crossing, nor to show the speed of another train going over the same crossing in the opposite direction.
2. NEW TRIAL—*Exclusion of Evidence—When Harmless.*—The judgment of a trial court will not be reversed for refusing to permit a witness to answer a question where it is clear that the witness did not have the requisite knowledge of the subject about which he was being interrogated, and the interrogator was not prejudiced by the action of the trial court.
3. RAILROADS—*Grade Crossing—Duty of Traveller—Look and Listen—Case at Bar.*—It is the duty of one about to cross a railroad at grade to look and listen for approaching trains before going on the track, and to do so when and where his listening will be reasonably effective. The track itself is a proclamation of danger. In the case at bar, the evidence discloses such contributory negligence on the part of the plaintiff's intestate, who was killed by a collision with a train at a grade crossing, as bars the plaintiff's right of recovery.

Statement.

Error to a judgment of the Circuit Court of Lunenburg county, in an action of trespass on the case. Judgment on demurrer to the evidence for the defendant. Plaintiff assigns error.

Affirmed.

This was an action to recover for the death of the plaintiff's intestate, occasioned by a collision at a grade crossing with a passenger train of the defendant company. The plaintiff's intestate was driving a two-horse wagon down a road. It was claimed, among other things, that the view of the crossing was obstructed by weeds and bushes, and that the train which inflicted the injury was running at a rate of speed much higher than usual. It became important to show at what distance the train could be seen from the highway, and how long it would take for the train to travel from the point at which it could be first seen to the public crossing. Plaintiff undertook to establish these facts by different witnesses. One witness, Eddie Owen, after testifying to the relative position of the railroad and the public highway, and as to other matters connected more or less immediately with the case, was asked a question which was permitted to be answered. The question and answer are as follows:

"Have you even seen a two-horse wagon on that crossing, or the feet of the horses on that crossing, going across the track and a train just coming out of the cut at the same time—the first that he could see it?

"Not right on the crossing, but a little ways from the crossing, I saw a wagon once—I think about '72—Mr. Jones—William Jones, of Mecklenburg, was driving, and I think he was within about as far as from here to that gate (refers to gate in railing surrounding the bar), about three yards of the crossing, and I motioned to him to stop; I was standing on the west of the bank, on the dirt road. I used to own that land there. I saw a freight train coming out of the mouth of the cut as he

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was approaching the crossing from the south, and I tried to stop him; he didn't seem to understand me at all, but he finally looked down and then slashed his mules—the wagon had a body may be 16 feet long, and a pair of mules attached to it; three negroes were in the wagon and two empty hogsheads; he slashed his mules and had just about cleared the track when the engine struck the end of the wagon body.”

Subsequently, on motion of the defendant company, this evidence was stricken out and the plaintiff excepted. This constitutes the plaintiff's second exception referred to in the opinion of the court.

The fourth and fifth bills of exception are as follows:

“Be it remembered: That on the trial of this cause, all the proceedings being had, as set forth in the previous bill of exception, and which is hereby made a part of this exception, and the following witnesses having testified (here insert the testimony of G (J) Walter Davis, Eddie Owen, George Owen, J. A. Shackleton, Junius Glenn, Richard Bell, Sam Pollard, Emmet Lash, George Fowlkes, Harry Stokes, George McCormick, William Neal, Caroline Rowlett, Charles Egleston, Rose Hudson, Jim Doswell, J. M. Grymes, Mrs. C. L. Stokes, Bernard Shackleton, & W. R. Borum, in behalf of the plaintiff, the plaintiff introduced H. M. Allen to further maintain the cause in her behalf, and asked the said H. M. Allen the following question: ‘Mr. Allen, were you ever present at the railroad crossing at which Mr. Ham (W. H.) Stokes was killed, when an ordinary two-horse wagon was placed on one side of the track, with the heads of the horses over the rails, and the said wagon driven across the track until it was out of danger on the other side, and the time that that wagon took to pass from one point to the other was timed?’

“To which the witness answered: ‘Yes, sir.’

“Whereupon the plaintiff, by counsel, asked the witness, ‘What was the time?’ expecting the witness to answer 19 seconds as is also shown by the examination of the witness as to what his evidence would be, after the jury had retired.

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"Which examination is here made a part of this exception, taken from the record testimony and which answer was material in plaintiff's behalf.

"Whereupon the defendant, by counsel, objected to all testimony made with the wagon in question.

"Which objection the court sustained. To which action of the court in sustaining the said exception, and in refusing to permit the witness to answer said question, and to testify as to any experiment made with the said wagon, the plaintiff, by counsel, excepts, and prays that this, her 4th bill of exception may be signed, sealed and enrolled and made a part of the record in this cause, which is accordingly done.

"GEO. J. HUNDLEY. (Seal.)"

"Be it remembered: That on the trial of this cause, all the proceedings being had, as set forth in the previous bill of exceptions, which are made a part of this bill of exception, and all the witnesses having testified in chief, and the defendant having introduced all his testimony (here insert testimony of witnesses down to Love), the plaintiff introduced the said J. D. Love in rebuttal as to the speed of the train which killed W. H. Stokes; when the said Love was asked the following questions. (Here insert testimony of said Love.)

"Whereupon the court, on the motion of the defendant, by counsel, ruled as follows:

"I (the court) strike it out, all the evidence of the witness as to speed, not applied to this particular train.

"To which ruling of the court in striking out said evidence, the plaintiff, by counsel, excepts, and prays that this, her fifth bill of exceptions may be signed, sealed and enrolled and made a part of the record in this cause, which is accordingly done.

"GEO. J. HUNDLEY. (Seal.)"

The other facts sufficiently appear in the opinion of the court.

Opinion.

G. S. Wing, for the plaintiff in error.

Munford, Hunton, Williams & Anderson, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is an action to recover damages for the alleged negligent killing of the plaintiff's intestate by the Southern Railway Company.

Upon the trial of the cause, the defendant company demurred to the evidence. Its demurrer was sustained, and a judgment rendered in its favor. To that judgment this writ of error was awarded.

It appears that about five o'clock on the 22nd day of August, 1903, a southbound passenger train of the defendant company ran upon the plaintiff's intestate, W. H. Stokes, who was crossing its track at a highway grade crossing near Meherrin, in the county of Lunenburg, in a two-horse wagon loaded with wheat, killing him and his two mules, and destroying his wagon.

The contention of the plaintiff is that the proximate cause of the accident was the failure of the defendant to cause the whistle on its engine to be blown for the crossing, as required by statute, and the running of its train, which was behind time, at an unusually rapid rate of speed.

The defendant claims that the crossing signal was blown, and that the train was not running in excess of forty miles an hour, its schedule rate; and insists that even if it was guilty of negligence in the management of its train, the proximate cause of the accident was the failure of the decendent to exercise due care before going upon its track.

The plaintiff took five bills of exceptions to the action of the court in refusing to permit her to introduce certain evidence, all of which, except the first, are relied on here as grounds for reversing the judgment complained of.

Opinion.

The assignments of error based upon bills of exception two, four and five, are without merit. The evidence objected to was clearly inadmissible. One related to the crossing of a wagon in front of a freight train more than thirty years before; another to the time it required a different wagon and team to go over the track of the defendant at the crossing; and the third to the speed of another train going in the opposite direction.

It appears from bill of exception No. 3 that the plaintiff wished to ask Eddie Owen, one of her witnesses, if he knew the condition of the defendant's right of way at the crossing five hours after the accident occurred, stating that she expected to prove by the witness that the view from the crossing was obstructed by undergrowth on the right of way. The court refused to allow the question to be asked.

Whether or not the defendant's right of way at or near the crossing had upon it undergrowth which would have prevented the plaintiff's intestate from seeing the approach of the train which caused his death, was a material question. The trial court so thought, as it permitted both the plaintiff and defendant to introduce witnesses to prove the condition of the right of way at that point prior and subsequent to the accident. The bill of exception discloses no reason why the court declined to permit the question we are now considering to be asked; but another bill of exception, to which it refers, shows that the witness had already stated that he did not know the conditions of the right of way at the time of the accident, and that when he went there five hours afterwards (the accident occurred about five o'clock P. M.) it was dark.

While it would have been better to have permitted the question to be asked, no prejudice resulted to the plaintiff from the court's action, since it is clear from what the witness had already testified that he did not know what the condition of the right of way was at the time designated in the question.

This brings us to consideration of the case upon the demurrer to the evidence.

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In the view we take of the case, it is unnecessary to determine whether or not the defendant was guilty of negligence in the management of its train as charged in the declaration. For if it was, the proximate cause of the accident, as shown by the evidence, was the contributory negligence of the plaintiff's intestate.

The crossing is a dangerous one, and Mr. Stokes, who lived in the neighborhood and was on his way to mill, knew this. The county road crosses the railway track a little obliquely, in a cut which extends some distance both north and south of the crossing. The bank or side of the cut, which is about twenty-five feet from the centre of the railway track, at the point where the highway crosses the railway was originally about seven feet deep. Five or six years prior to the accident it had been cut down or lowered about two feet by the defendant, for a distance of about sixty-five feet along the highway and about seventy-five along the railway in the direction from which the train came. There were only three eye-witnesses to the accident. A boy about twelve years of age, a witness for the plaintiff, who was riding in the wagon with Mr. Stokes, testified that when they reached a point in the highway about two hundred feet from the crossing, "I told him I thought that I heard a roaring, and he stopped and just as he started off he said the train was going the other way, and we drove off down to the crossing and just as the mules' front feet got over the rail the train was right there. Then he commenced to whip the mules to get across and I jumped off." The witness further testified that he was sitting on the seat in the wagon with Mr. Stokes and on his right side.

The engineer in charge of the locomotive, who was introduced by the defendant testified that as his train approached the crossing "a short distance south of Meherrin, when I got within about 100 yards or 150 yards . . . I saw a mule team—two-horse wagon with two mules to it, being driven by a white gentleman—I did not know who he was—sitting in the wagon

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driving them. He looked at me. I saw him and I commenced blowing the steam whistle . . . and he commenced whipping his team up to cross over ahead of me; consequently he got his mules just about across the track and the fore wheels of the wagon were just pulling up on the rail when the engine struck him." The engineer further testified that he put on the emergency brakes and did everything he could to stop the train; that when he first saw the mules they were about twenty-five or thirty feet from the track.

The other eye-witness, also put on the stand by the defendant, was a girl who was sitting at a window in a house about eighty yards from and in full view of the crossing as Mr. Stokes approached it. She testified that when she first saw the wagon it was about thirty-five steps from the crossing, a little back of where the "cut-off" was; that he was whipping his team when she first saw him, and at that time she had heard the rattle of the train and "seen the smoke from it."

An approaching train could not be seen from the point two hundred feet from the railway track where Mr. Stokes stopped his wagon, nor could it be seen until he reached the "cut off," sixty-five feet from the crossing, at which point he could see along the railway seventy-five feet.

The defendant's evidence shows by actual measurements made, and views taken, sometime after the accident, that an approaching train could be seen 287 feet, when within fifty feet of the crossing; 665 feet, when within thirty-two feet of it; and 1528 feet when within twenty-five feet. But the plaintiff's evidence tends to show, that on account of weeds and small undergrowth growing on the "cut-off" at the time of the accident, an approaching train could not be seen more than seventy-five feet from the crossing until a point thirty feet from it was reached, when an approaching train could be seen a short distance—how far is not shown.

The uncontradicted evidence of the engineer is that when within 100 or 150 yards of the crossing he saw Mr. Stokes

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and his team when the mules were about 25 or 30 feet from the track, and that Mr. Stokes looked at or toward him. If Mr. Stokes saw the approaching train as the engineer testifies, then it was clearly his duty to have kept off the railway track. If he did not see the approaching train, he could have seen it if he had been in the exercise of due care. The track itself was a proclamation of danger, and it was his duty, before going upon it, to use his eyes and ears—to look and listen—and to do so when and where his looking and listening would be reasonably effective. *Johnson v. C. & O. Ry. Co.*, 91 Va. 171, 21 S. E. 238; *Washington, &c., Ry. Co. v. Lacey*, 99 Va. 460, 475-6, 26 S. E. 834; 2 Shear. & Red. on Neg., §§ 476, 478. He had no right to conclude, as he seems to have done, that the “roaring” heard two hundred feet away from the track was made by a train going away from instead of coming toward the crossing. He had crossed the railway track more than a mile from and north of the crossing, and had traveled along the highway, the general direction of which was parallel with the railway and not far from it. It is not pretended that any train passed either way during that time. Having been warned by the “roaring” of a train, which he had no right to believe had passed, he ought to have been the more careful before going upon the track.

The little boy sitting in the wagon by Mr. Stokes testified that as the wagon approached the track from the point where they halted he looked and listened—in what direction he looked he does not state. He was sitting on the seat on the side farthest from the train. His size, his position and the direction the wagon was moving prevented him from seeing the train until it was right upon them, unless he leaned forward or backward so as to look around Mr. Stokes. It is not shown that he did this.

We are of opinion that the Circuit Court did not err in sustaining the defendant's demurrer to the evidence, and the judgment must be affirmed.

Affirmed.

Statement.

Richmond.**SELDEN'S EX'OR. v. KENNEDY.**

January 25, 1906.

1. **ADMINISTRATION—Living Person—Presumption from Absence—Code, Sec. 3373—Lack of Notice—"Due Process"—Constitutional Law.**
The grant of letters of administration on the estate of a living person, as if he were dead is absolutely void; and if it be conceded that the Legislature intended by section 3373 of the Code to authorize the courts to grant administration upon the estate of a person who was once a resident of the State and has been absent therefrom and unheard from for more than seven years, irrespective of his death, the statute is a plain violation of the due process clause of the 14th Amendment to the Constitution of the United States. A statute which authorizes the taking of an absentee's property and administering it when he is alive, without his knowledge or consent, and in a proceeding to which he is not a party, and of which he has no notice, is a clear violation of the "due process" clause of said Amendment.
2. **LACHES—Defeating a Right—Case in Judgment.**—Laches which will defeat a right must be such as to afford a reasonable presumption of satisfaction or abandonment of the claim, or such as to prevent a proper defense by reason of the death of parties, loss of evidence or otherwise. Whether the lapse of time is sufficient to bar a right must depend upon the particular circumstances of each case. In the case in judgment, the parties in interest are still living, no evidence has been lost by death, no records have been destroyed nor papers lost, there is no uncertainty as to the amount due, no presumption of payment, and the claimant cannot be said to have been guilty of such laches as will bar his right to recover.

Appeal from a decree in chancery of the Law and Chancery Court of the city of Norfolk. Decree for complainant. Defendant appeals.

Affirmed.

Opinion.

The opinion states the case.

Loyall & Taylor, for the appellant.

Burroughs & Bro., for the appellee.

BUCHANAN, J., delivered the opinion of the court.

This suit was instituted by C. E. Kennedy against C. W. Grandy, surviving executor of Dr. William Selden, deceased, to recover a legacy.

It appears that Dr. Selden, by his last will and testament, which was probated in November, 1887, bequeathed to Charles H. Kennedy the sum of \$1,000. Kennedy died before the testator, leaving three children, who under section 2523 of the Code were entitled to the legacy. The executors paid to two of the children their portion of the legacy. Upon the 7th day of January, 1896, the Corporation Court of the city of Norfolk, upon proof that C. E. Kennedy, the other child, had been a resident of this State and had since gone from and had not returned to the State, more than seven years prior to that date, adjudged, ordered and decreed that he was and should be presumed to be dead, as declared by section 3373 of the Code, and appointed T. D. Kennedy, his brother, administrator of his estate. A few days after his appointment he collected his brother's share of the legacy from the appellant as surviving executor of Dr. Selden.

In 1904 C. E. Kennedy, who had been absent from the State for many years, made a demand upon the surviving executor for his share of the legacy; and upon his refusal to pay the same this suit was instituted, and upon a hearing of the cause a decree was rendered against him for the sum demanded. From that decree this appeal was taken.

The first assignment of error is that the payment made by the appellant to T. D. Kennedy, as administrator of the estate of the appellee, was a valid payment, and that the trial court erred in not so deciding.

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In order to sustain this contention, it will be necessary to hold that section 3373 of the Code, when considered in connection with section 2659, which provides for the granting of letters of administration when a person is dead, authorizes the appointment of an administrator of the estate of the appellee, under the facts disclosed by the record; and if it does, that it is not in conflict with that portion of the 14th amendment to the Constitution of the United States, which ordains that no State shall "deprive any person of life, liberty, or property without due process of law."

Section 3373 is as follows: "If any person, who shall have resided in this State, go from and do not return to the State for seven years successively, he shall be presumed to be dead in any case wherein his death shall come in question, unless proof be made that he was alive within that time."

It may well be doubted whether the Legislature intended by that section to authorize the courts to grant letters of administration upon the estate of a person who was once a resident of the State and had been absent therefrom for more than seven years, irrespective of death. But if it be conceded that such was its intention, is not the statute in plain violation of the due process of law clause of the 14th amendment?

It is conceded, and if it were not it is well settled, that the grant of letters of administration on the estate of a live man, as if he were dead, is absolutely void.

In the case of *Scott v. McNeil*, 154 U. S. 34, 38 L. Ed. 896, 14 Sup. Ct. 1108, the question of the validity of such letters of administration was fully discussed, the authorities, English and American, cited, and the conclusion reached that a court of probate, in the exercise of its jurisdiction over the probate of wills and the administration of estates of deceased persons, had no jurisdiction to appoint an administrator of a living person, and that the appointment of an administrator, after public notice to the next of kin, creditors and the like of the estate of a living person, who had been absent from the State more than seven

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years, was in violation of the due process of law clause of the 14th amendment to the Constitution of the United States. And there are general expressions in that opinion which would seem to indicate that a State was absolutely without power to provide by special proceeding for the administration and care of the property of an absentee, and to confer jurisdiction on its courts to do so, irrespective of the fact of death.

But in the recent case of *Cunnius, &c., v. Reading School Dist.*, 198 U. S. 458, 49 L. Ed. 1125, 25 Sup. Ct. 721, that court, in considering the validity of certain statutes of the State of Pennsylvania "relating to the grant of letters of administration upon the estates of persons presumed to be dead by reason of long absence from their former domicil," held that the due process of law clause of the 14th amendment to the Constitution of the United States does not wholly deprive a State of the power to confer jurisdiction on its courts to administer the estates of absentees, irrespective of the fact of death, by special and appropriate proceedings distinct from the general law for the settlement of the estates of decedents. It further held, that fixing the period of a person's absence from his last domicil within the State at seven years, or more, before his estate could be administered under the special proceedings, was not so unreasonable as to render the statute repugnant to the due process of law clause of the 14th amendment; and that the notice required to be given by order of publication before an administrator could be appointed, and the safe-guards provided for the protection of the property of the absentee in case of his return, satisfied the requirements of the 14th amendment. But the court expressed the opinion in that case, that a State law which did not provide, among other things, for adequate notice as a prerequisite to the proceedings for the administration of the estate of an absentee would be repugnant to the 14th amendment.

It is said that the expression of the court in that case, that the appointment of an administrator of the estate of an absentee while he is still living, without adequate notice as a prerequisite

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to such appointment would be void, was unnecessary to a decision of that case, and therefore a mere dictum. Even if this were so, the principle there announced is in accord with the repeated declarations of that court, as to what is required by the due process of law clause of the 14th amendment. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Scott v. McNeil*, *supra*.

Tested by that rule, a statute which provides for the taking of an absentee's property and administering it, when he is alive, without his knowledge or consent and in a proceeding to which he is not a party and of which he has no notice, is clearly in violation of his rights under the 14th amendment.

The other assignment of error is that the trial court ought to have denied the relief sought, because of the long delay of the appellee in asserting his claim.

It has always been a principle of equity to discourage stale demands, and laches is often a defense wholly independent of the statute of limitations. But the rule is adopted because after great lapse of time, from death of parties, loss of papers, or death of witnesses, there is danger of doing injustice, and there can be no longer a safe determination of the controversy. *Tazewell v. Sanders*, 13 Gratt. 354; *Bargamin v. Clark*, 20 Gratt. 544, 553; *Rowe v. Bentley*, 29 Gratt. 756, 763; *Jameson v. Rixey*, 94 Va. 342, 346, 26 S. E. 861, 64 Am. St. Rep. 726.

Mere delay is not always laches, and laches in the assertion of a right is not always sufficient to defeat it. The laches must be such as to afford a reasonable presumption of satisfaction or abandonment of the claim, or such as to prevent a proper defense by reason of the death of parties, loss of evidence, or otherwise. *Tazewell v. Sanders*, *supra*, 362; *Jameson v. Rixey*, *supra*, 346, and cases cited. Whether the lapse of time is sufficient to bar a recovery must of necessity depend upon the particular circumstances of each case. *Aylett v. King*, 11 Leigh, 486; *Rowe v. Bentley*, *supra*, 763; *Bell v. Wood*, 94 Va. 677, 683, 27 S. E. 504.

Tested by these general principles, the facts of this case do

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not make out such a case of laches as ought to bar the app of his right to recover. The time between the accruing of right to collect the legacy and the institution of his suit is a fifteen years—a long time to delay the assertion of his right he had knowledge of it. It is not shown when he first learned it, but it does appear that he had been absent from the State more than seven years before letters of administration on estate were granted; that during that period he had not been heard from by his nearest relatives; and that he was still a resident at the time of the institution of his suit. We think may be fairly inferred from the record that he had no knowledge of his rights until after his legacy had been paid to his administrator, and probably not until shortly before he made his demand upon the appellant and instituted his suit. But if it is conceded that he knew that the legacy had been left him, the only thing, other than mere lapse of time, that could stand in the way of his right to recover is, that the appellant voluntarily paid it to another who had apparent, but no real authority to receive it, and who gave a refunding bond for appellant's protection. The appellant whose duty it was to pay, and the appellee, who was entitled to receive the legacy, are both living; no evidence has been lost by death; no records have been destroyed or papers lost; there is no uncertainty as to the amount that is due, and no presumption of payment. In the absence of all of these, the equitable circumstances which generally constitute the grounds for the application of the doctrine of laches we do not think that the appellee can be said to be guilty of laches as will bar his right to recover.

We are of opinion that there is no error in the decree appealed from, and that it should be affirmed.

Affirmed

Statement.

Richmond.

SELDEN, TRUSTEE, v. BROOKE, COLLECTOR.

January 25, 1906.

1. **TAXATION—Choses in Action—Non-Resident Trustee—Resident Beneficiary.**—Intangible personal property in the hands of a non-resident trustee, in the income from which a person over the age of 21 years residing in this State has a life estate, is, by virtue of the statute in such case made and provided (Acts, 1897-8, p. 519, amending Code, section 492), taxable in this State in the county or corporation in which the beneficiary resides. The tax, though assessed in the name of the trustee, is not against him, but the beneficiary. He is the mere conduit through the medium of which the tax upon the property of a citizen passes into the treasury.

Appeal from a decree in chancery of the Law and Chancery Court of the city of Norfolk. The collector of delinquent personal property taxes filed his petition in the chancery suit of *Selden v. Selden et als.*, pending in said court, in which the trustee holding the funds sought to be taxed was appointed, praying to be admitted a party, and that certain taxes be decreed and paid over to him. From a decree in favor of the collector, the trustee holding the fund appeals.

Affirmed.

The opinion states the principal facts of the case. It was agreed by counsel that the beneficiary for life of the trust fund resided in Norfolk, Va., during the years for which the taxes were assessed, but that some of the parties entitled in remainder after the death of the life tenant did not reside in Norfolk, and that

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the choses in action had, at all times, been kept by the trustee in his personal possession outside the State. The decree directed the taxes to be paid by the trustee out of any *income* in hand or to be received from the trust fund.

Hughes & Little, for the appellant.

Tazewell Taylor, for the appellee.

WHITTLE, J., delivered the opinion of the court.

This case involves the validity of certain taxes assessed by the city of Norfolk for the years 1898, 1899 and 1900, upon a trust fund consisting of intangible personal property in the hands of a non-resident trustee, in the income of which the *cestui que trust*, Elizabeth T. Selden, a citizen of the State domiciled in that city, has a life estate.

The trustee was appointed and bonded by a decree of the Corporation Court of the city of Norfolk, which had jurisdiction of the fund, and which directed the trustee to pay the income and revenue accruing therefrom to the *cestui que trust* "during her entire life." The cause was subsequently transferred, by force of the statute in such case made and provided, to the Court of Law and Chancery of the city of Norfolk, where it is now pending; and this appeal is from a decree of that court, which confirmed the report of a commissioner sustaining the validity of the assessment, and ordered the trustee to pay the taxes out of the income.

It is the policy of this Commonwealth to impose taxes upon all intangible property of its citizens in the county or corporation of their residence, without regard to the situs of the physical symbols by which such property is evidenced. *Commonwealth v. Williams*, 102 Va. 778, 47 S. E. 867. But the specific enactment by authority of which these assessments were made is as follows: "If the property is the separate property of a per-

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son over twenty-one years of age, or a married woman, it shall be listed and taxed to the trustee, if any they have, and if they have no trustee it shall be listed by and taxed to themselves; in either case it shall be listed and taxed in the county or corporation where they reside. . . . If the property is held for the benefit of another, it shall be listed by and taxed to the trustee in the county of his residence (except as hereinbefore provided)." Acts, 1897-98, p. 519, amending section 492 of the Code of 1887.

While the statute may be unskillfully drawn, we are of opinion that by fair construction the case in judgment is obviously within its provisions. The income from the trust fund, upon which the tax is imposed, constitutes, in a certain sense, the separate property of Elizabeth T. Selden, a person over twenty-one years of age, who has a trustee, and resides in the city of Norfolk. The language, "If the property is held in trust for the benefit of another, it shall be listed by and taxed to the trustee in the county of his residence (except as hereinbefore provided)," is controlled by the antecedent provision, that whether the person whose property is amenable to tax has or has not a trustee, the property shall, "in either case be listed and taxed in the county or corporation where they reside." Though the tax is assessed in the name of the trustee, the burden is, in reality, imposed upon the beneficial owner, a resident of the Commonwealth, who enjoys the protection of its laws along with other citizens, and ought, in fairness, to contribute her due proportion of revenue for the support of the government.

The term "*separate estate*," in the connection in which it occurs, imports separate ownership by the persons designated, in contradistinction to an equitable separate estate, or the legal separate estate of a married woman, under our statute. 2 Bouv. L. Dict. (Rawles Rev.) 981.

If the construction contended for on behalf of the appellant, that the domicile of a non-resident trustee fixes the *situs* of intangible personal property for purposes of taxation, were to

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prevail, it would afford ready means of escape from taxation and divert from the treasury of the State a very large amount of revenue to which, in our judgment, it is justly entitled. The contention that the construction indicated would render the statute unconstitutional, proceeds upon the hypothesis that the tax is against the non-resident trustee, whereas he is personally unaffected by the imposition, and is but the conduit through the medium of which the tax upon the property of a citizen passes into the State treasury. *Hunt v. Perry* (Mass.), 43 N. E. 103; *Lewis v. County of Chester*, 60 Pa. St. 325.

It was suggested that there are other statutes which authorize the assessment of the tax, but the view already taken disposes of the question and renders further consideration of the case unnecessary.

The decree is plainly right and is affirmed.

Affirmed.

Richmond.**NORFOLK & WESTERN RAILWAY COMPANY v. BELL.**

February 2, 1906.

1. **MASTER AND SERVANT—*Safe Appliances—Reasonably Safe, not Safest.***
While a master ought to keep reasonably abreast with improvements in machinery for the protection of his servant, he is not bound to furnish the safest instrumentalities, but only such as are reasonably safe. The test is not whether the instrumentality selected is the best to be had, but is it reasonably adequate and proper for the use to which it is to be applied.
2. **MASTER AND SERVANT—*Safe Appliances—Comparative Safety—Appliances used by other Masters.***—While a witness, with adequate knowledge, may testify as to the general practice of masters, and the comparative safety of different appliances, it is not competent for him to show that the different methods or appliances of another master are better than those of the defendant. On this subject even the skillful and the experienced may differ, and negligence cannot be established by such comparison.
3. **EVIDENCE—*Hearsay—Case at Bar.***—An endorsement made by a third party on a paper offered in evidence that a particular instrumentality is used on all engines made at a certain shop, or that the instrumentality is the most effective against explosions, and is absolutely safe against injuries to workmen, is mere hearsay and is inadmissible in evidence.
4. **MASTER AND SERVANT—*Safe Place—Fireman Running Engine—Servant out of Place.***—Where, under the rules of a railroad company, a fireman is permitted to run an engine in the presence of the engineer, and thereby learn to become an engineer, the company owes him the duty, while running the engine, of using ordinary care to provide and maintain a reasonably safe place in which he is to do the work, including reasonably safe machinery and appliances considering the character of the work to be done, and the difficulties

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and dangers attending it. A fireman, standing on the side of the engineer, and running an engine under such circumstances, while an apprentice employed by the company is doing the firing, cannot be said to be in a place where he had no right to be.

5. INSTRUCTIONS—*Abstract Propositions*.—Instructions should state the law as applicable to the particular facts which the evidence in the case tends to prove, and not mere abstract propositions of law.

Error to a judgment of the Circuit Court of Campbell county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Instructions No. 1, given by the trial court, and commented on in the opinion below, is as follows:

“(1) The court instructs the jury that if they believe from the evidence that the plaintiff was, on the 21st day of October, 1902, in the employment of the defendant in the capacity of fireman on one of its engines, as alleged in the declaration, and that, as one of the inducements to said employment as fireman, he was permitted, in the presence of the engineer, to run the engine, and thereby learn to be an engineer, then it was the duty of the defendant to use ordinary care to provide and maintain a reasonably safe place in which he was to perform said work, including reasonably safe machinery, appliances and instrumentalities, taking into consideration the character of the work to be done and the difficulties and dangers attending it; and a failure on the part of the defendant to perform this duty would be negligence.”

F. S. Kirkpatrick and *Wm. Hodges Mann*, for the plaintiff in error.

Lee & Howard and *Whitehead & Whitehead*, for the defendant in error.

Opinion.

BUCHANAN, J., delivered the opinion of the court.

This action was brought by George L. Bell, a fireman of the Norfolk and Western Railway Company, to recover damages for injuries resulting from the bursting of a glass water-gauge, which it was alleged the railway company had negligently constructed and maintained on its engine, upon which the plaintiff was at work when injured.

The first error assigned is to the action of the trial court in the admission of evidence.

The plaintiff put upon the stand a witness, who testified that he was a locomotive engineer and had worked as such on the Seaboard Air Line, Atlantic Coast Line, and Southern Railways, and that he had also worked on the Norfolk and Western Railway as fireman and engine-hostler. The witness was permitted to describe the kind of water-gauge in use on the Seaboard Air Line Railway, and to identify and put in evidence a blue-print or cut showing its character. Upon this blue-print, which is made a part of the record, the original of which is before this court, there is endorsed, "This is the style of water-gauge used by Pennsylvania R. R., and almost entirely by Richmond Locomotive Works on everything they construct.

"J. D. M."

Another witness, who testified that he had worked on the Norfolk and Western Railway and on the Southern Railway, was permitted to describe the water-gauge in use on the Southern Railway, and the advantages which the gauge used by that company had over that used by the Norfolk and Western Railway. He also identified a cut or picture of the gauge in use on that road, on a paper introduced in evidence, which contained the manufacturer's statement of the advantages of that gauge, among which were, that it furnished "most effective protection against explosions," and "absolute safety against injuries to workmen."

One of the objections made to the evidence, is that the al-

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leged failure of the defendant company to exercise ordinary care to provide and maintain a reasonably safe water-gauge on its engine could not be shown by proving that another railway company provided a different and safer gauge on its engines.

In selecting between different instrumentalities for his purposes, the master should keep reasonably abreast with improved methods, so as to lessen the danger to those in his service; but he is not bound, in the performance of his duty, to furnish the best-known instrumentalities, but such only as are reasonably safe. The test is not whether he has omitted to do something he could have done, nor whether a better appliance could have been obtained or a better method adopted, but whether the selection made was reasonably prudent and careful, and the instrumentality selected reasonably adequate and proper for the use to which it was to be applied. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869; *Norfolk & Western Railway Co. v. Cromer*, 99 Va. 763, 787, 40 S. E. 54.

It has been repeatedly held by this court, that a witness having sufficient knowledge on the subject, may testify as to the general practice of masters, and the comparative safety of different methods or appliances; but it is not competent to show that the different methods or appliances of another master are better than those of the defendant. It is supposed that in such matters even the skillful and experienced will frequently differ in their choice of instrumentalities. A party should not be judged to be negligent for not conforming to some other method, or for not using some other appliance believed by some to be less perilous. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 640, 27 S. E. 509; *Southern Ry. Co. v. Mauzy*, 98 Va. 692, 694-5, 37 S. E. 285; *Dunn v. Parlett*, 102 Va. 459, 463, 46 S. E. 467.

The blue-print showing the kind of water-gauge in use on the Seaboard Air Line Railway, and the paper containing the cut or picture of the water-gauge used by the Southern Rail-

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way, were amenable to the further objection that the endorsement on the blue-print as to the use of the gauge by other companies, and the statement in the other paper that the gauge described was most effective against explosions and was absolutely safe against injuries to workmen, were mere hearsay statements, and inadmissible.

The action of the court in refusing to give the instructions asked for by the defendant, and in giving its own instructions is assigned as error.

The objection made to instruction No. 1 given by the court is that there was no evidence upon which to base it.

The defendant claimed that the plaintiff was not entitled to recover because he had no right to be where he was when injured. The evidence tended to show that the defendant had placed a young man on the engine to learn how to fire, and that while he was engaged in that work the plaintiff, who was the regular fireman, was on the engineer's side of the cab, running the engine, in the presence of the engineer; that under the rules of the defendant the engineer was required to instruct the fireman in all his duties, and not to permit him to run the engine except when the engineer himself was present, or upon the order of the superintendent or master mechanic; and the fireman was required to obey the orders of the engineer.

That evidence was sufficient to justify the court in giving the instruction in question.

It is not contended, as we understand the defendant's objections to the other instructions given by the court, that they do not state the law correctly, or that they do not cover all the questions involved in the case; but the contention is that they—especially the third, fourth and fifth instructions—stated it in such a general way, and with so little application to the facts of the case, that their effect was to mislead rather than to aid the jury.

There is some foundation for this contention. But as the judgment will have to be reversed because of the admission of

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illegal evidence, as hereinbefore pointed out, it will be unnecessary to consider the objections to the action of the court in giving and refusing instructions, as the evidence will not be the same on the next trial, further than to say that instructions should state, not abstract propositions of law, but the law as applicable to the particular facts which the evidence in the case tends to prove.

The plaintiff insists that there is sufficient evidence in the case, after rejecting that which was objected to, and which we have seen should have been excluded, not only to sustain the verdict of the jury, but to have compelled a verdict in his favor.

In this he is mistaken. The evidence introduced by the defendant to show that it had exercised ordinary care to provide and maintain a reasonably safe glass water-gauge on its engine was sufficient to have sustained a verdict in its favor if the jury had so found.

We are of opinion, therefore, to reverse the judgment complained of, set aside the verdict, and remand the case for a new trial, to be had not in conflict with the views expressed in this opinion.

Reversed.

Syllabus.

Richmond.**BELLENOT V. LAUBE'S EXECUTOR AND OTHERS.**

February 2, 1906.

Absent, Whittle, J.

1. **PARTY WALLS—Case in Judgment—Intention of Parties.**—Where the owner of a lot upon which there is a double tenement separated by a dividing wall, each building being exactly like the other, conveys said lots to two different grantees on the same day, and describes each lot as bounded by the other, and also gives the distance of the beginning point of each from a street nearby, but says nothing about the wall being a party wall, but the parties so regard the wall for a number of years, and so describe it in numerous conveyances of the lot, and it is manifest from the description given in the conveyances from the original grantor that such was the intention of the grantor and the respective grantees, and such construction is necessary to effectuate the rights of said parties, such wall will be held and considered as a party wall.
2. **JUDICIAL SALE—Purchaser—Notice of Contents of Record—Boundaries—Party Wall—Commissioner's Deed—Excess of Powers.**—A purchaser at a judicial sale is chargeable with notice of the contents of the record under which he purchases as to the title, boundaries, etc., of the property sold. If the decree directing the sale and that confirming it describe the property as beginning so many feet from a given street "at the center of the partition wall between it and the adjoining tenement on the east," and that is all the parties to the suit owned, but the commissioner, in making the deed to the purchaser, omits the words quoted, such omission cannot enlarge the rights of the purchaser, and he cannot claim the whole of the wall even though covered by the distance mentioned. He can get no more than the parties to the suit owned, and if the language of the commissioner's deed covers more, it is in excess of his powers.

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3. **PARTY WALLS—What Constitutes—Rights of Parties—Dividing Walls—Presumption.**—A party wall is a dividing wall between two houses to be used equally, for all the purposes of an exterior wall, by the respective owners of both houses. It is a substitute for a separate wall for each adjacent owner, and one owner may carry it up to a necessary height for his purposes and the adjacent owner cannot compel him to remove it. In the absence of evidence to the contrary, every wall of separation between two buildings is presumed to be a party wall.
4. **PARTY WALLS—Rebuilding—Strengthening.**—If a party wall be in a state of ruin, and the necessity for rebuilding be established by men skilled in the business, after due notice, one party may compel the other to contribute to the expense of rebuilding it, but if one party only wishes to make the wall wider or higher for his own benefit, he must do so at his own expense, without extending the wall further upon the land of the other party, and without diminishing his rights in the party wall when reconstructed.

Appeal from a decree in chancery of the Chancery Court of the city of Richmond. Decree in favor of defendants. Complainant appeals.

Affirmed.

The opinion states the case.

Hill Montague, for the appellant.

Smith, Moncure & Gordon for the appellees.

HARRISON, J., delivered the opinion of the court.

In November, 1862, Robert Ellett owned a lot fronting 132 feet on the southwest corner of Broad and Monroe streets, then in the county of Henrico, now in the city of Richmond. On the 5th of that month he conveyed 72 feet fronting on the southwest corner of Broad and Monroe streets to one Creed Thomas, leaving 60 feet, upon which was erected a double brick tenement. On the same day that the deed to Thomas was made, Ellett conveyed this remaining 60 feet, by separate

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deeds, as follows: To M. Nenzel 29 feet front lying immediately on the west of and adjoining the Thomas lot, described as follows: "All that certain lot of land, with a granite front brick tenement thereon, beginning 72 feet from the west side of Monroe street, running thence westwardly on the south side of Broad street and fronting thereon 29 feet, running back southwardly at right angles, &c., bounded on the west by the property this day conveyed by the parties of the first part to S. D. Abernathy." The deed to S. D. Abernathy contains the following description of the property conveyed thereby: "That certain lot of land, with a granite front brick tenement thereon, beginning at a distance of 101 feet from the west line of Monroe street, running thence westwardly on the south side of Broad street and fronting thereon 31 feet, running back southwardly at right angles, between parallel lines, &c., bounded on the east by the property this day conveyed by the parties of the first part to M. Nenzel."

It is clear that the sole ownership by Robert Ellett of the double brick tenement on this 60 foot lot was by these two deeds severed, and one tenement known as No. 409 West Broad St. became the property of M. Nenzel, and the other tenement became the property of S. D. Abernathy.

These two tenements were alike in every respect. They were brick buildings divided by a brick wall nine inches or more in thickness. The deed to Nenzel describes his house and lot as bounded on the west by the property that day conveyed to Abernathy, and the deed to Abernathy describes her property as bounded on the east by the property that day conveyed to M. Nenzel. While the deeds do not speak of the dividing wall between the two tenements as a party wall, it is manifest from the description in each conveyance that such was the intention of the grantor and the respective vendees. By no other construction of these deeds could the manifest rights of each vendee be effectuated. It is further clear from the record, as shown by the subsequent alienations of these two tenements, that the suc-

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cessive owners regarded and treated the centre of the division wall between the houses 409 and 411 as the division line between the two properties, that line being the eastern boundary of the Abernathy house and the western boundary of the Nenzel house.

In January, 1870, S. D. Abernathy sold her house and lot No. 411, to John E. Jones, and described the same as, beginning at the distance of about 101 feet from the west line of Monroe street, and at the centre of the partition wall between this and an adjoining tenement on the east. In November, 1886, Jones conveyed house and lot No. 411 to McGruder & Jones, in which deed the property was again described as, beginning at the centre of the partition wall between it and the adjoining tenement on the east. In 1891 McGruder & Jones conveyed to Nannie M. Marshall and others, using the same language recognizing and describing the centre of the division wall as the boundary line between the two houses and lots Nos. 409 and 411. This house and lot, No. 411, was next sold in a suit brought for partition by Nannie M. Marshall, and was bought by the appellant, Frances Bellenot.

The deed from the commissioner to the appellant describes the house and lot as, beginning at a point distant 101 feet west from the southwest intersection of Broad and Monroe streets, running westwardly along the south line of Broad St. a distance of 31 feet, leaving out the description contained in the previous deeds, "*and at the centre of the partition wall between this and the adjoining tenement on the east.*"

It is this description in her deed from the commissioner that appellant relies on in support of her claim, that the centre of the partition wall is not the true dividing line between her property and that of the appellees, the contention being that, "beginning at a point distant 101 feet west from the southwest corner of Broad and Monroe streets," as described in the deed from the commissioner, would entitle her to the whole of the wall dividing the two houses, Nos. 409 and 411 West Broad st.

The appellant bought the house and lot No. 411 at a judicial

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sale, and both the decree of sale and the decree confirming the sale to her and directing the commissioner to make her a deed described the property as, beginning at a point about 101 feet west of the west line of Monroe street, *at the centre of the partition wall between it and the adjoining tenement on the east*. These decrees describe the property that appellant is entitled to, and because the commissioner left out of the deed the description, "*at the centre of the partition wall between this and the adjoining tenement on the east*," the rights of appellant cannot be thereby enlarged. The deed of the commissioner was in excess of his power and the grantee took only such estate as the court had. *Scott v. Moore*, 98 Va. 688, 37 S. E. 342, 81 Am. St. Rep. 749. The court only sold the title of the parties to the suit.

Nor can the appellant claim want of notice that the deed from the commissioner varied the description of the lot actually purchased by her. It was a judicial sale, and the records of the court and the papers in the cause were the only reliable sources of information as to the property to be sold, the title, boundaries, etc. To these the purchaser should have looked. *Long v. Weller*, 29 Gratt. 347; *Pillow v. S. W. Imp. Co.*, 92 Va. 145, 23 S. E. 32, 53 Am. St. Rep. 804.

Upon this branch of the case our conclusion is that, by the deeds of Robert Ellett in 1862, the centre of the division wall between the tenements Nos. 409 and 411, was established as the dividing line between the two properties; that this line was recognized by the grantees in those deeds as fixing their respective rights, and has been asquiesced in by subsequent alienations as the true dividing line up to the institution of this suit, a period of more than forty years; and that no part of the building of the appellees rests upon the land of the appellant.

In December, 1891, house and lot No. 409 was purchased by Joseph W. Laube at a judicial sale. Since the institution of this suit Laube has died, and the cause has been revived in the names of his executor, and his legatees and devisees. In

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1902, Laube pulled down the old house and kitchen on his up to the partition wall between 409 and 411, leaving said partition wall intact, running it up somewhat higher in order properly construct a two-story brick store-house then erected by him.

The partition wall between these two properties was a party wall. Every wall of separation between two buildings is presumed to be a common or party wall, if the contrary be shown; and this not only is a rule of positive ordinance, but principle of ancient law. Washburn on Easements (4th Ed. p. 611.

A party wall is a dividing wall between two houses, to be used equally, for all the purposes of an exterior wall, by the respective owners of both houses. It is a substitute for a separate wall for each adjacent owner; and one owner may carry it up to a necessary height for his purposes, and an action will not lie by his adjacent owner to compel its removal. *Everett v. Edwards*, 149 Mass. 588, 22 N. E. 52, 5 L. R. A. 110, 14 A. St. Rep. 462; *Graves v. Smith* (Ala.), 6 South. 308, 5 L. R. 298, 13 Am. St. Rep. 60; *Nalle v. Paggi* (Tex.), Sup. Ct. 9 W. 205, 1 L. R. A. 33; *Harbor v. Evans* (Mo.), 14 S. W. 7 10 L. R. A. 41, 20 Am. St. Rep. 646.

In Jones on Easements, sec. 632, it is said: "A party wall is a dividing wall between two houses, to be used as an exterior wall for each. . . . The term 'party wall' may designate a wall divided longitudinally in two moieties, each moiety being subject to a cross-easement in favor of the owner of the other moiety." This he says is the sense in which the term is most frequently used in the United States.

In the light of these authorities, it is clear from the evidence, that Laube, in erecting the new building on his lot, did not, in his use of the party wall, exceed his legal rights with respect thereto, and did not deprive appellant of any portion of her full rights and easements therein, or do her any damage of which she can complain.

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About one year after Laube had erected his new building, the appellant pulled down her house No. 411, up to this party wall, for the purpose, as alleged in her bill, of erecting on the lot a new building, the ground floor of which was to be used as a store, and the floor above as a public hall. The decree appealed from holds, among other things, that the old party wall is insufficient in strength to support a building such as the plaintiff in her bill alleges that she contemplates building on her lot; and therefore it is adjudged that appellant has the right, if she elects so to do, to pull down the old party wall and erect a new party wall, at her own risk and cost, of greater width and height, provided that the rights of the appellees in and to the new wall shall not be increased or diminished by such reconstruction, and provided further that no part of such new wall shall occupy a greater portion of the land of the appellees than the old party wall now occupies.

The appellant has no reasonable ground of objection to this provision of the decree. If the common wall be in a state of ruin, and requires to be rebuilt, one party can compel the other, by action, to contribute to the expense of rebuilding it. But the necessity of the rebuilding must be established by the judgment of men skilled in the business, and made on due previous notice; and if the new wall be made wider or higher, &c., the party building must bear the extra expense. Washburn on Easements, pp. 611-12.

It is manifest that the old party wall, nine inches thick, is insufficient to support one side of a building thirty-one feet wide, the upper floor of which is to be used as an assembly hall, and that appellant cannot erect a building for the purposes contemplated by her without a thicker and stronger wall. The old party wall, as it now stands, is sufficient for the purposes of the appellees. If, therefore, appellant desires to erect a building which requires a thicker and stronger wall, she must erect such wall at her own expense.

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In proper order the demurrer to the bill should have been disposed of first. It is, however, sufficient to say that it was properly overruled.

Upon the whole case, we are of opinion that there is no error in the decree appealed from and it must be affirmed.

Affirmed.

CRIMINAL CASES.

Richmond.

JERNIGAN V. COMMONWEALTH.

December 7, 1905.

1. CRIME DISTINGUISHED FROM TORT—*Unlawful Fishing—Code, Sec. 2071.*—An act forbidden by a public statute, punishable by a proceeding in the name and for the benefit of the State, and, if the judgment is not satisfied, by confinement in jail, is a crime and not a mere tort; and, being a crime, the defendant upon conviction by a Justice is entitled to an appeal. Unlawful fishing in private waters, in contravention of Code, Sec. 2071, is a misdemeanor.

Error to a judgment of the Circuit Court of Princess Anne county, dismissing an appeal from the judgment of a justice of the peace.

Reversed.

The opinion states the case.

J. M. Keeling and *N. T. Green*, for the plaintiff in error.

Attorney-General Wm. A. Anderson, for the Commonwealth.

BUCHANAN, J., delivered the opinion of the court.

The plaintiff in error was arrested upon a warrant issued by a justice of the peace, for committing a wilful trespass by going upon and fishing in waters on lands owned by one Bradford, in violation of section 2071 of the Code.

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Upon a hearing of the case he was found guilty and fined five dollars and the costs. From this judgment he appealed to the Circuit Court. Upon motion of the attorney for the Commonwealth, that court dismissed the appeal, upon the ground that it did not have jurisdiction of the case. To that judgment this writ of error was awarded.

By section 2071 of the Code it is provided, among other things, that if any one, without the consent of the owner or tenant, fish in the waters on another's land lying east of the Blue Ridge, he shall be guilty of a trespass, and upon conviction thereof shall be fined not less than five nor more than fifty dollars, and in addition thereto shall be liable for damages.

By section 2073 it is provided, that every person violating either of the two preceding sections may be arrested and held to await judgment; that the offender shall be carried before a justice in the county in which the offence was committed, who shall proceed to try the case and give judgment thereon. If judgment be rendered against the offender, it shall be for the forfeitures, pecuniary and otherwise, and the costs and expenses incurred; and if the offender does not satisfy the judgment in full, the justice shall commit him to jail for one month, unless satisfaction be sooner made.

By clause 8, sec. 2070b, in the same chapter of the Code, it is provided that all fines and penalties imposed or collected under the provisions of that chapter (95) shall be paid to the Commonwealth.

It is conceded by the accused that if the proceeding against him was a civil proceeding the Circuit Court had no jurisdiction of his appeal, as the judgment against him did not exceed ten dollars. (Sec. 2947, Va. Code, 1904). But his contention is that the proceeding against him was a criminal proceeding, and that under the provisions of sections 4106 and 4107 of the Code, he has the right of appeal.

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Whether a proceeding is civil or criminal is sometimes difficult to determine. At common law the mere going upon another's land was a civil injury but not a crime, (*Henderson's Case*, 7 Gratt. 708, 710, 56 Am. Dec. 160); and if the offense with which the accused was charged and convicted is criminal, it is because it is made so by statute.

Mr. Bishop, in discussing the difference between public and private wrongs, says, that "Whenever, therefore, the public deems an act of private wrong as of a nature requiring the public protection for the individual, it makes the act punishable at its own suit; or in other words, makes it a crime." 1 Bish. New Crim. Law, sec. 233.

Judge Cooley, in his work on Torts, quoting with approval from Austin's Jurisprudence, says: "An offense which is pursued at the discretion of the injured party or his representative is a civil injury. An offense which is pursued by the sovereign or the subordinate of the sovereign is a crime." Cooley on Torts (2nd Ed.), p. 96.

It is said in 12 Cyc. 131, that the real distinction between a tort and a crime lies in the method in which it is pursued.

In a note to the case of *Reg. v. Page*, 3 Post. & F. 29, it is stated, that "the distinction" (between a civil and a criminal proceeding) "taken in the most ancient and approved authorities, is not whether the crown is a party (for so it is in *mandamus* and *quo warranto*), but whether the real end or object of the proceeding is punishment or reparation." See generally as to what is a criminal proceeding, Cooley on Torts (2nd Ed.) 94-6; 1 Bish. New Cr. Law, §§ 230, &c.; *State v. Bryan*, 44 N. C. 244-5; *State v. McConnell*, (N. H.) 46 Atl. Rep. 458, 460; *U. S. v. Eaton*, 144 U. S. 677, 36 L. Ed. 591, 12 Sup. Ct. 764.

It would seem clear from the authorities cited that the pro-

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ceeding under consideration lacks the essential elements of a civil proceeding. The act with which the accused was charged was forbidden by statute, and a fine imposed for its violation; the warrant against him, under which he was arrested, tried and convicted, was a proceeding by the Commonwealth; the penalty imposed was for her benefit; and for a failure to satisfy the judgment rendered against him the justice was not only authorized but required to commit him to jail for one month, unless the judgment was sooner paid. While the warrant was issued upon the complaint and information on oath of the tenant of the land trespassed upon, it was in no sense a proceeding for his benefit, or for the benefit of the owner of the land, and was not intended in any way to make reparation for the private injury done by the accused in going upon the land, but was intended to punish him for violating the statute forbidding the act.

We are of opinion that the proceeding was not a civil, but a criminal proceeding under a public statute; and as all offenses in this State which are not felonies are misdemeanors (Va. Code, 1904, sec. 3879), the offense for which the accused was prosecuted, found guilty and fined, was a misdemeanor, and he had the right to appeal to the Circuit Court under the provisions of sections 4106 and 4107 of the Code.

The judgment of the Circuit Court, dismissing the appeal, must therefore be reversed, and the cause remanded to be proceeded in according to law.

Reversed.

Statement.

Richmond.**HAYNES V. COMMONWEALTH.**

December 14, 1905.

1. **BRIBERY—Policeman an Executive Officer—Code, Sec. 3744.**—A policeman is an executive officer within the meaning of Code, Sec. 3744, making it a felony to offer any gift or gratuity "to any executive, legislative, or judicial officer." This section embraces all inferior executive officers, whose duties are for the most part ministerial. The most important powers and duties of a policeman—to execute the laws—are executive, though if they were chiefly ministerial, he would still be within the meaning of the statute.
2. **EVIDENCE—Admissibility—Bribery—Collateral Matters.**—On an indictment for attempting to bribe an officer by offering to pay him a sum of money to release the accused and drop the case, it is not admissible to show that a young girl had been given whiskey to drink, and had had intercourse with a man at the house of the accused the previous night. Such evidence is entirely collateral to, and has no connection with, the alleged attempt to bribe the officer.
3. **CRIMINAL LAW—Admitting Illegal Evidence—Effect—Prejudice.**—If an accused may have been prejudiced by illegal evidence, even although it is doubtful whether he was or not, a judgment on a verdict of conviction should be reversed.

Error to a judgment of the Hustings Court of the city of Richmond, on indictment for attempt to bribe.

Reversed.

The opinion states the case.

Wise & Watkins, for the plaintiff in error.

Attorney-General Wm. A. Anderson, for the Commonwealth.

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HARRISON, J., delivered the opinion of the court.

The plaintiff in error was convicted in the Hustings Court of the city of Richmond for the statutory crime of bribery. While under arrest for keeping and maintaining a disorderly house, resorted to for immoral purposes, she offered John H. Tyler, a police officer of the city of Richmond, twenty-five dollars if he would agree to drop and dismiss the proceeding against her.

The indictment was found under section 3744 of the Code, which is, so far as material, as follows:

"If any person give, offer or promise . . . any gift or gratuity to any executive, legislative, or judicial officer, . . . with intent to influence his act, vote, opinion, decision, or judgment, on any matter, question, cause or proceeding which is or may be then pending, or may by law come or be brought before him in his official capacity, he shall upon conviction be confined in the penitentiary not less than one nor more than ten years."

It is contended on behalf of the accused, that a police officer is not such an officer as was contemplated by section 3744 of the Code—that he is not an "executive" but a purely ministerial officer.

A policeman is a State officer, (*Burch v. Hardwick*, 30 Gratt. 24, 32 Am. Rep. 640) and we are of opinion that the statute was designed to embrace such an officer within its terms. In the triple classification employed by section 3744, the term "executive officer" is not limited in its application to the chief magistrate of the Commonwealth, but embraces as well inferior executive officers, whose duties are for the most part ministerial.

In *Throop on Public Officers*, section 23, the author, quoting from Judge Cooley, says: "The duties imposed upon the of-

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ficer are supposed to be capable of classification under one of these heads: the legislative, executive, or judicial; and to pertain accordingly to one of the three departments of government designated by those names. But the classification cannot be very exact, and there are numerous officers who cannot be classified at all under these heads. The reason will be apparent if we name one class as an illustration. Taxing officers perform duties which in strictness are neither executive nor judicial, though in some particulars they must execute the orders of superiors, and others they judge for themselves what is to be done; but sometimes, also, their duties partake of the legislative. All such officers are usually called administrative, while inferior executive officers are designated ministerial."

In the light of this authority, a ministerial officer is an executive officer, and is included within the class embraced by that term, though he may be regarded as an inferior executive officer. A policeman is not, however, a purely ministerial officer. His general duties are defined by clause (1) of sec. 1017a, Va. Code, 1904, as follows: "The officers and privates constituting the police force of the cities and towns of the Commonwealth of Virginia shall be, and they are hereby, invested with all the power and authority which now belong to the office of constable at common law in taking cognizance of, and enforcing, the criminal laws of the Commonwealth, and the ordinances and regulations of the city or town, respectively, for which they are appointed or elected and it shall be the duty of each and every one of such policemen to use his best endeavors to prevent the commission within the said city or town of offenses against the laws of said Commonwealth, and against the ordinances and regulations of said city or town; to observe and

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enforce all such laws, ordinances and regulations; to detect and arrest offenders against the same; to preserve the good of said city or town, and to secure the inhabitants thereof from violence and the property therein from injury."

Some of the duties here prescribed are ministerial, but many of them are in a high degree executive. It is the chief duty of a policeman to execute the laws of the Commonwealth, both the punishment and prevention of crime; indeed his most important powers and duties are executive. But if his functions be regarded as chiefly ministerial, he comes within the letter and meaning of the statute, which makes it a felony to offer a bribe to any executive officer of the Commonwealth to influence his act; for, as already said, public officers whose duties are ministerial are included under the head of "executive officers." It cannot be supposed that the Legislature intended that the crime denounced by section 3744 of the Code, should be committed with impunity by those executive officers whose duties may be defined as being chiefly or entirely ministerial. Such a construction would exclude from the operation of the statute a large number of the public officers of the Commonwealth.

Bills of exception Nos. 1 and 2 are to the action of the court in permitting certain questions to be asked the witness, Alma Goddin, and answered by her against the protest of the State's counsel.

Alma Goddin was fourteen years old, and was one of the small girls who were found in the house of ill-fame kept by the accused. This witness was asked and answered the following questions:

"State whether or not you went upstairs with a man."

Ans. "Yes, sir, she made me go up there."

"You say they gave you something to drink?"

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Ans. "Yes, sir, after I got up there."

"Tell whether the man had intercourse with you, or something to do with you, on Thursday night."

Ans. "Yes, sir."

The indictment in this case was for the crime of bribery, and at the time of trial there was pending against the accused another proceeding, charging her with having abducted Alma Goddin.

It is a well settled rule of law that the evidence must be confined to the matter in issue. The facts laid before the jury must consist exclusively of the transactions which form the subject of the indictment, for it is these alone that the prisoner can be expected to have come prepared to answer. *Trogon v. Commonwealth*, 31 Gratt. 862; *Moore v. City of Richmond*, 85 Va. 538, 8 S. E. 387.

Evidence of collateral facts is generally inadmissible because it tends to draw away the minds of the jury from the point in issue, and to excite prejudice and mislead them. There are exceptions to this rule, as in cases where the intent or guilty knowledge of the party accused is a material ingredient in the issue of the case. In such cases collateral facts—that is, other acts and declarations of a similar character—tending to establish such intent or guilty knowledge, are admissible, provided they are not too remotely connected with the offense charged. *Trogon's Case*, *supra*; *Bottomley v. U. S.* 1 Story, 135.

The collateral fact that Alma Goddin had been given whiskey to drink, and had had intercourse with a man at the house of the prisoner the previous night, had no connection with the alleged attempt to bribe the officer. These are not acts of a similar nature or character, and they do not tend to prove that a bribe was offered with intent to influence the officer. The intent to influence the act of the officer had been shown by clear proof of the offer of \$25.00 if he would release the ac-

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cused and drop the case, and the introduction of the evidence here objected to could only have had the effect of prejudicing the minds of the jury, and causing them to heighten the punishment for the crime of bribery with which the plaintiff in error stood charged.

If the accused may have been prejudiced by the evidence, even though it be doubtful whether in fact she was so or not, it is sufficient for reversing the judgment. *Trogon's Case, supra.*

For these reasons the judgment of the Hustings Court must be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

CARDWELL, J., concurs in results.

Reversed.

Statement.

Richmond.

CREMEANS V. COMMONWEALTH.

December 14, 1905.

1. CRIMINAL LAW—*Continuances—Discretion of Trial Court—Right to Call for Evidence—Opportunity to Prepare for Trial.*—A motion for a continuance is addressed to the sound discretion of the court under all the circumstances of the case, and, while an appellate court will supervise the action of an inferior court on such motion, it will not reverse a judgment on that ground unless such action is plainly erroneous. This discretion, however, of trial courts must be exercised with due regard to the constitutional guaranties of a fair and impartial trial to one accused of crime, and the right "to call for evidence in his favor." One accused of crime should be accorded a fair opportunity to prepare for his defense, and to secure the presence of witnesses, if any he has. Such opportunity is not afforded when a prisoner is forced into trial in the absence of material witnesses, by issuing a summons for the witnesses then, and assuring the prisoner that if they arrive before verdict they can testify, and, if not, their testimony may be made the basis of a motion for a new trial.
2. APPEAL AND ERROR—*Refusing Continuance—When Harmless Error.* Although it may appear that a motion for a continuance on account of the absence of material witnesses for an accused should have been granted, yet if it is subsequently made to appear that no such witnesses in fact existed, the accused cannot complain that the motion to continue was erroneously over-ruled, as he has not been injured thereby, and a judgment will not be reversed for an erroneous ruling that could not have been prejudicial to the party complaining thereof.

Error to judgment of the Circuit Court of Giles county, sentencing the plaintiff in error to be hanged.

Affirmed.

Opinion.

The opinion states the case.

Jno. W. Williams and A. H. Woodyard, for the plaintiff in error.

Attorney-General Wm. A. Anderson, for the Commonwealth.

WHITTLE, J., delivered the opinion of a majority of the court.

This writ of error is to a judgment of conviction of the plaintiff in error, Morris Cremeans, of murder in the first degree.

It appears that on the night of April 24, 1905, Cremeans shot George Kid, while the latter was in bed at his home in Giles county, inflicting upon him a mortal wound of which he died a few days thereafter. Cremeans was pursued by the officers of the law, arrested the day following the shooting, in Bluefield, W. Va., and brought back into Virginia without a requisition. Having waived a preliminary examination, he was lodged in jail to await indictment and trial.

On May 8, 1905, he was indicted by a special grand jury summoned for that purpose; and, being without counsel, the court assigned two members of the bar to defend him. Thereupon the prisoner moved the court to continue the case until the first day of the next term, on the ground of the absence of material witnesses, and testified in support of his motion that four men were eye-witnesses to the homicide, two of whom were unknown to him, but that the other two, whom he named, were residents of Buchanan county. In further support of the motion, counsel for the prisoner represented to the court, that though they had not had the opportunity of talking with those witnesses, they believed from information derived from the accused that their evidence was not only material but indispensable to his defense.

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The motion was resisted by the attorney for the Commonwealth, who introduced the widow and daughter of the deceased, both of whom testified that they were in the room when the fatal shot was fired, "and that the door of the house was closed, and that there were no such witnesses on the outside as claimed by the defendant; or, if there were, they did not know it." Whereupon the court overruled the motion for continuance, and also the motion of the prisoner to set the case for trial at a later day of the term; and he was forthwith put upon trial. The court in that connection observed, that it would award process for the witnesses and permit them to testify, provided they arrived before the trial was concluded; otherwise their evidence would be taken and considered upon a motion to set aside the verdict.

This ruling of the court was made the ground of exception, and constitutes the assignment of error relied on here to reverse the judgment.

There is no rule of practice better settled in this State than "that a motion for a continuance is addressed to the sound discretion of the court under all the circumstances of the case; and that although an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground, unless such action was plainly erroneous. Where the circumstances satisfy the court that the real purpose in moving for a continuance is to delay or evade a trial, and not to prepare for it, then though the witnesses have been summoned and the party has sworn to their materiality and that he cannot safely go to trial without them, the continuance should be refused." This doctrine is laid down in *Hewitt's Case*, 17 Gratt. 627, and the principal case has been followed and cited as authority for the proposition enunciated in numerous decisions of this court. The cases on the subject will be found collected in a note to 17 Gratt. (Va. Rep. Anno.) 441,

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While we approve the wisdom of the above-mentioned rule, and are in entire sympathy with its object, which is to prevent unnecessary delay and promote the prompt and effective administration of the criminal law, still the wide discretion vested in trial courts in that respect must be exercised with due regard to the provisions of the Bill of Rights, which secure to one accused of crime a fair and impartial trial; and to that end safe-guard his right "to call for evidence in his favor." Const. of Va., sec. 8, p. cex.

In deference to that fundamental requirement, we cannot sanction a practice which, in "a capital or criminal prosecution," forces the accused into trial in the absence of his witnesses, upon the theory that they will be summoned and examined if they should arrive before verdict; and, if not that their testimony may be made the basis of a motion for a new trial. Such practice, we conceive, violates both the letter and spirit of the Constitution. In a case of the gravity of the one in question, involving the life of a citizen, we are of opinion that, under the circumstances narrated touching the motion for a continuance, the Circuit Court ought to have postponed the trial for a reasonable time to afford the prisoner opportunity to prepare for his defense. And we have no hesitation in saying, that but for subsequent developments in the case, which, in our opinion, justify the conclusion that there were no such witnesses in existence as those relied on by the prisoner, we should feel constrained to reverse the judgment and award the prisoner a new trial.

It appears, however, both by the return upon the process and the testimony of the deputy sheriff of Buchanan county and the sheriff of Dickenson county, that no such persons lived in either county, or could be found there, and as the sole ground assigned for delay was the absence of these alleged witnesses,

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the prisoner could not have been prejudiced by the ruling of the court in the particulars mentioned. Therefore, such ruling does not constitute reversible error; for it is the settled rule of this court, that though the ruling of the trial court may have been erroneous upon some proposition submitted to it, yet if it is apparent from the whole record that the party complaining was not, and could not have been, prejudicially affected by such ruling, it affords no ground for reversing the judgment. *Colvin v. Menefee*, 11 Gratt. (Va. Rep. Anno.) 87, and note; *Kincheloe v. Tracewells*, 11 Gratt. 587; *Farmers, &c., Asso. v. Kinsey*, 101 Va. 236, 244, 43 S. E. 338.

While it is true that the authorities cited were civil cases, the principle announced is of general application, except when the court is dealing with a mandatory requirement of the law, in which case the principle of *strictissimi juris* obtains. The testimony of the deputy sheriff of Buchanan county and the sheriff of Dickenson county was not controverted, and it would be a vain thing for this court to reverse the judgment and remand the case for a new trial on account of the absence of imaginary witnesses.

On the merits, the record presents a case of unwonted atrocity. The prisoner, who had invaded the home of the deceased in the night-time for an immoral purpose, and made indecent proposals to his married daughter, was ordered off, and for that cause alone shot his defenceless victim while in his bed with his wife, and in the presence of his family.

The other assignments of error were not pressed, and, being without merit, do not demand further notice.

It only remains to say that the judgment must be affirmed.

KEITH, P., *concurring*.

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The law applicable to continuances, as declared in *Hewitt's Case*, 17 Gratt. 627, is set forth in the opinion of the court. The rule and the exceptions are both clearly stated.

The rule is that the affidavit of the prisoner as to the materiality of an absent witness will entitle the accused to a continuance, or to time to procure his attendance. The exception is that it will not so entitle him if it appears to the court that the object of the accused is to postpone the trial, and not to make preparation for a trial.

This is the issue addressed to the court on the motion for a continuance: Is it made in good faith, or is it a mere pretext for delay? This issue is tendered to and must be decided by the court upon all the circumstances before it. It is addressed to the sound discretion of the court, and the exercise of its discretion, while reviewable, will not be reversed unless it plainly appears that it has been improperly exercised.

In the case before us the accused made the required affidavit, but the Circuit Court, after hearing evidence, concluded that his motion was not made in good faith.

At the moment of the homicide, there were present in the room in which it was committed, the deceased, his wife, his married daughter, a little child who was asleep, and the prisoner. He claims that there were four men on the outside of the house. The wife and daughter say that the door was shut, and that they neither saw nor heard any one else at any time. The weight of evidence then was against the prisoner. But this is not all. It subsequently appeared, by the return of the sheriff and deputy sheriff, and by their testimony, that no such witnesses were found, and that no such persons dwelt in the counties to which the writs of summons were directed at the instance of the accused. It also appears from the testimony of the prisoner that on the night of, and just before the homicide, he went into the

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store of W. T. Ould, and that he was accompanied to the store by the four men who were on the outside of the Kid house; but Ould says that the prisoner came into his store alone, and that he neither saw nor heard of any companions of the accused.

On the whole case, I am of opinion that the Circuit Court decided the motion for a continuance in accordance with the weight of evidence, as it appeared when the motion was made and disposed of, and that the conclusion of the court was vindicated by all the facts and circumstances of the case as they were subsequently developed; and on the whole case I fully concur with the judgment of the court.

CARDWELL, J., *dissenting*:

I am unable to concur in the opinion of the court in this case.

How the course pursued by the trial court with reference to the motions made for a countinuanee and to lay the case over to a later day of the term, in order that counsel might confer with the prisoner and prepare for his defense, made in the utmost good faith, as counsel assured the court, can be condemned as it is in the opinion, and yet it be held that the denial of these motions was harmless error, is beyond my comprehension.

The offense with which the prisoner was charged was committed on April 24, 1905. The prisoner was arrested in Bluefield, W. Va., the next day, and voluntarily returned to Giles county, where he was lodged in jail to await indictment by the grand jury; he having waived a preliminary examination before a justice. The regular grand jury terms of the court of Giles county are February and September, and prisoner did not know and had no reason for knowing that a special grand jury would be impaneled to consider his case, and had therefore made no preparation for the trial, when, on the 8th day of May, 1905, a special grand jury was impaneled and brought in an indictment against him for murder in the first degree. The prisoner being

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unprepared for trial, without counsel to conduct his defense, and without means to employ counsel, the court appointed two members of the bar to defend him, and the trial was immediately gone into.

Even after the refusal of the continuance asked by the prisoner, to which he was entitled, as the opinion of the court admits, and the request of counsel that the case be laid over till a later day in the term that they might properly prepare the prisoner's defense, was denied, the trial court saying, that "it would award process for the witnesses and permit them to testify provided they arrived before the trial was concluded; otherwise this evidence would be taken and considered upon a motion to set aside the verdict;" and after the evidence for the Commonwealth had gone to the jury, counsel for the prisoner again asked that the case be passed until the summons addressed to the sheriff of Buchanan county on the first day of the term had been returned, and this request was also denied.

It will be observed that the opinion of the court, after discussing the rights of one accused of crime which are to be safeguarded, and stating the course pursued at the trial of the prisoner, says: "Such practice, we conceive, violates both the letter and spirit of the Constitution;" yet it is held that the several errors committed by the court below were harmless, because it appears "both by the return upon the process and the testimony of the deputy sheriff of Buchanan county, and the sheriff of Dickenson county, that no such persons lived in either county, or could be found there, and as the sole ground assigned for delay was the absence of these alleged witnesses, the prisoner could not have been prejudiced by the ruling of the court in the particulars mentioned."

This leaves out of view the fact that the prisoner had been afforded no opportunity whatever to be prepared to refute the

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statements made by the deputy sheriff of Buchanan county and the sheriff of Dickenson county, after he had been tried and convicted, and assumes, to the prejudice of the prisoner plainly, that these officers knew every person who could be found in their respective counties, although they did not profess to have such knowledge. Was it to be expected, under these circumstances, that the prisoner would be prepared to refute the statement of these officers? Surely not. Who knows but that, by reason of these persons whom prisoner desired as witnesses being at or near the deceased's house when the alleged crime was committed, and the excitement in the neighborhood over the occurrence, they were in hiding in the apprehension that they might be considered as *particeps criminis*? The widow and daughter of the deceased, it will be observed, qualify materially their statement that "there were no such witnesses on the outside of the house, as claimed by the defendant," when they add, "if there were they did not know it."

Of course, whenever it is made to appear that the application for a continuance is for the mere purpose of evading, or to delay a trial, the continuance should be denied. In *Hewitt's Case*, cited in the opinion of the court, the indictment for assault and battery was found April 25, 1863, the accused was arrested September 23, 1863, and admitted to bail. There was no term of the court of Bedford county till April, 1864, when the case was called for trial. The accused was not present when his counsel made a motion for a continuance, based on the affidavit of the accused as to the materiality of a witness who had been summoned but was absent, made two days before, and on the morning that the motion was made the accused was at Liberty (the county seat), and left going west, not saying where he was going. *Held*, that the trial court did not err in its opinion, "that

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the defendant was attempting to *evade* a trial by absenting himself from court, so as to prevent a personal examination in open court on his motion for a continuance."

That case and the case before us are wholly dissimilar.

The cases cited in the opinion of the court in this case in support of the conclusion that the prisoner was not prejudiced by the rulings of the trial court complained of by the prisoner are all civil cases, in which the court was dealing only with the question, whether or not the party complaining was prejudiced by instructions given or refused, and not with the question presented in this case.

The case before us involves human life, and the question to be determined is whether or not the citizen condemned to suffer the extreme penalty of the law has had that fair and impartial trial guaranteed to him by the Constitution of the State. In the consideration of that question, the enormity of the crime charged, and the evidence in support of the charge, are to be left out of view, for however grave the charge, or incriminating the evidence in support of it or how the accused's station in life may be, he was nevertheless entitled to the trial the mandate of the Constitution of the State requires in all cases involving the life or liberty of the citizen.

If, however, we are to look to the evidence for the prosecution in determining the question, whether or not the prisoner in this case has had such a trial—which, I repeat, we have no right to do—a horrible murder has been committed by him, and if, upon such a trial, he had been found guilty of the crime charged against him, he would rightly share the fate that now awaits him; but not without such a trial, as appears plain to me. Although the Commonwealth was, in the acquisition and submission of its evidence, unhampered, it fails to show malice on the part of the prisoner towards his victim, or that there was any premeditation in the act of shooting him; while the theory of

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the prisoner's defense was, that the shooting was accidental, and he, who alone testified in his behalf, so testified. The record does not, in my opinion, justify the statement in the opinion of the court, that the prisoner invaded the home of the deceased, etc. On the contrary, it appears that he had been there that very evening of the shooting as the guest of the deceased, on the most friendly terms, and had been absent from the house but a very short while when he returned to look for something he claimed to have left or missed after he went away.

Under the circumstances surrounding the trial of the prisoner, can it be safely said what the verdict of the jury would have been had the trial court done what clearly it should, at least, have done, postponed the trial for a reasonable time to afford the prisoner an opportunity to prepare for his defense? I think not.

Far better and safer, in such a case, as it seems to me, to award the prisoner a new trial, than to carry the doctrine of harmless error to the extent of establishing the dangerous precedent that a trial court may impose upon one accused of a crime a hardship and a wrong, and then put him upon terms of extricating himself, in the event the jury finds him guilty, without affording him an opportunity to do so, and bind him to the results by subsequent testimony taken and considered by the court, which the victim of the practice could not, under the circumstances, by any possibility have refuted.

In stating my views of this case, I have done so with the utmost deference to the views of the majority of the court, and of the learned and conscientious judge who presided at the trial in the Circuit Court; but, believing as I do that a very dangerous precedent is to be established in the refusal of a new trial to the prisoner, I deemed it necessary to state my reasons for dissenting.

Affirmed.

Syllabus.

Richmond.**HOBACK V. COMMONWEALTH.**

January 18, 1906.

1. **CRIMINAL LAW—Venire Facias—Who to Furnish Names—Effect of Quashing—Second Writ—Procedure—Irregularities—Code (1904), Secs. 4018, 4019.**—A circuit court judge wrote to the clerk "to summon thirty first-class men for the first day of the term to serve as venire men." The clerk drew from the box provided by law the names of thirty persons, and issued a writ of *venire facias*, directing the sheriff to summon thirty persons of his county to be taken from a list furnished him by the judge of the court, and attached the list. The sheriff executed the writ by summoning the persons named. On the trial of a felony case, when this venire was called, the prisoner moved to quash the writ, and the court quashed it. The court then issued a second writ of *venire facias*, directing the sheriff to summon sixteen persons of his county from a list furnished him by the judge. To this writ was attached a list containing the names of sixteen persons taken by the judge from those summoned under the first writ, which had been quashed. The prisoner moved to quash this writ, but the motion was overruled. Not having secured a panel from these sixteen names, a third writ of *venire facias* was issued, summoning two additional persons whose names were taken by the judge from those present in response to the first writ, which had been quashed. The prisoner moved to quash this writ, and the list accompanying it, but the motion was overruled.

Held:

1. The first writ of *venire facias* was properly quashed, as the law requires the list to be furnished by the clerk issuing the writ and *not by the judge*, and, furthermore, the method of drawing was irregular because, when more than twenty are ordered to be summoned, the law requires that the judge shall specify the number of names to be drawn and the number of persons to be summoned, and provides that the number drawn shall not be more than four in excess of the number summoned.

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2. When the first writ was quashed it was as though it had never existed, and the court was without a jury present from which to select a panel. The list was a part of the writ and when the writ was quashed, the list was annulled also.

3. The second writ should have been quashed also, as a person accused of a felony is entitled to a jury of twenty persons, to be drawn by the clerk or his deputy according to law, of whom sixteen must be summoned, whereas the writ contains the names of only sixteen persons not drawn at all, but furnished by the judge as above indicated. When the first writ was quashed the court should have proceeded *de novo* to have a jury drawn and summoned according to the provisions of Code, 1904, Sec. 4018. He had no panel to complete, and hence no right to summon by-standers. The conditions provided for by Code (1904), Sec. 4019 had not arisen.

4. The provisions of the statute in respect to impaneling juries in felony cases are not directory merely, but mandatory. In this case each of the writs directed the sheriff to summon persons from a list to be furnished by the judge, contrary to the mandate of the law, and hence was no process at all.

5. It is immaterial whether the prisoner is guilty or innocent. He is entitled to a fair and impartial trial in the mode prescribed by law, and has not had it.

6. The last paragraph of section 4018, Code 1904, relating to certain irregularities or errors in drawing, summoning, impaneling, etc., of juries in criminal cases was never intended to cure or relieve the fundamental error in the mode of selecting the jury which tried the prisoner, and has no application to such case.

7. The prisoner was tried by a jury selected by the judge without authority of law, has been deprived of the drawn jury prescribed by the statute, which was his right, and hence has not had that fair and impartial trial guaranteed to him by the law.

Error to a judgment of the Circuit Court of Floyd county in a prosecution for a felony.

Reversed.

The opinion states the case.

Archer A. Phlegar and J. C. Wysor, for the plaintiff in error.

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Attorney-General Wm. A. Anderson and R. L. Jordan, for the Commonwealth.

HARRISON, J., delivered the opinion of the court.

The plaintiff in error was found guilty of murder in the second degree, and sentenced by the Circuit Court of Floyd county, in accordance with the verdict of the jury, to penal servitude for a term of eight years. To this judgment a writ of error was awarded, bringing the case before us for review.

It appears from the record that the judge appointed to hold the court at which the prisoner was tried wrote to the clerk of the court to summon "thirty first-class men for the first day of the term to serve as veniremen." Upon receipt of this letter the clerk drew from the box provided by law the names of thirty persons, and with these names attached thereto issued a writ of *venire facias*, addressed to the sheriff, in these words: "We command you, that you summon and cause to come before the Circuit Court of the county of Floyd, at the courthouse, on the 17th day of July, 1905, (being the 1st day of July term of said court), thirty persons of your county, to be taken from a list furnished you by the judge of said court, who are qualified, &c."

On motion of the prisoner, by counsel, this writ was properly quashed, it being, on its face, in direct contravention of the express mandate of the statute, which requires that "the writ of *venire facias*, in case of a felony, shall command the officer to whom it is directed to summon sixteen persons of his county or corporation, to be taken from a list furnished him by the clerk issuing the writ, who are qualified, &c." Va. Code, sec. 4018.

In addition to the error appearing on the face of this writ,
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that the thirty persons mentioned were to be taken from a list furnished the officer by the judge, instead of by the clerk, the manner of drawing the persons named was irregular. It is true the judge could have ordered, for good cause shown, more than twenty persons to be drawn and placed in the list, but in such case the law requires that he shall specify the number of names to be drawn and the number of persons to be summoned; providing that the number drawn shall not be more than four in excess of the number to be summoned. Va. Code, 1904, sec. 4018. These provisions of the law with respect to drawing the jury were wholly disregarded, the letter of the judge to the clerk merely directing him to summon thirty persons, without specifying the number to be drawn, or how many of the number drawn were to be summoned.

After quashing the writ mentioned, the court issued a second writ of *venire facias*, addressed to the sheriff, in these words: "We command you to summon and cause to come before the Circuit Court of the county of Floyd, at the courthouse on this 17th day of July, 1905, being the first day of July term of said court, sixteen persons of your county, to be taken from a list furnished you by the judge of said court, who are qualified, &c." To this writ was attached a list containing the names of sixteen persons, taken by the judge from among those summoned under the first writ of *venire facias*, which had been quashed. Upon this writ the sheriff made the following return: "By virtue of the foregoing writ, I summoned the above named persons from a list furnished me by the judge of the Circuit Court of Floyd county." Not having secured a panel from these sixteen names, a third writ of *venire facias* was issued, summoning two additional persons, whose names were taken by the judge from the list of those present in response to the first writ which had been quashed. Before the jury thus summoned was

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sworn, the prisoner, by his counsel, moved the court to quash this writ of *venire facias*, and also to quash the list of jurors accompanying such writ, upon the ground that it commanded the sheriff to summon *sixteen* persons from a list furnished by the judge of the court. The action of the court in overruling this motion constitutes the first assignment of error.

This second writ of *venire facias* fails entirely to conform to the express mandate of the statute, which secures to one accused of a felony, a jury of twenty persons, drawn by the clerk of the court or his deputy in the manner prescribed by the statute, and requires that sixteen of the number so drawn shall be summoned.

It is contended on behalf of the Commonwealth that, although the first writ of *venire facias* was quashed, the thirty persons summoned under it remained and continued to be a legal list of drawn jurors summoned in compliance with the statute; and that when the second writ of *venire facias* was issued, it was done in pursuance of section 4019, Va. Code, 1904, which provides as follows: "In any case of felony, when a sufficient number of jurors to constitute a panel of sixteen free from exception cannot be had from those summoned and in attendance, the court may direct another *venire facias*, and cause to be summoned from the by-standers, or from a list to be furnished by the court, so many persons as may be deemed necessary to complete the said panel."

This position is, we think, untenable. Mr. Abbott, in his Law Dictionary, vol. 2, p. 364, defines the term "quash" as follows: "To annul, overthrow or vacate by judicial decision." When, therefore, the first writ was quashed, it was annulled, overthrown or vacated; in other words, it was as though it had never been issued, and the court was without a jury present from which to make up a panel. The persons

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present, who had been summoned under the first writ, were mere by-standers, and were no longer under the control of the court. The list was a part of the writ, and when the latter was annulled by the court's action, the former was vacated also. After quashing the writ, the only course open to the court was, to begin *de novo* and have a jury drawn and summoned in accordance with the provisions of section 4018. When the opportunity for a drawn jury, provided by section 4018 has been given, and jurors summoned, and the panel cannot be completed from that number, then under section 4019 the judge, to expedite the trial, may select the persons to be summoned to complete the panel; but section 4019 has no application in a case like this, where there was no panel to complete. If it were otherwise, the valuable rights secured to the accused by section 4018 could be wholly disregarded and denied him. The clerk would only have to issue an invalid writ, the court quash it, and then under section 4019 issue a new writ, summoning a jury selected by the judge.

As already seen, the statute, section 4018 (Acts, 1904, p. 16) expressly provides that the writ of *venire facias*, in case of a felony, shall command the officer to whom it is directed to summon sixteen persons of his county or corporation, to be taken from a list *furnished by the clerk issuing the writ*. The law in force prior to the adoption of section 4018 provided, that the *judge* should furnish the list; but the Legislature saw fit to change this law and to require that the list be drawn by *the clerk* in accordance with the provisions of section 4018. The letter and policy of the statute was to give the prisoner in the first instance a drawn panel, and in that way to secure a fair and impartial jury. Each of the three writs in this case directed the jury to be summoned from a list *furnished by the judge*. Neither writ conformed to the positive mandate of the law, and was, therefore, no process at all.

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In *Jones' case*, 100 Va. 846, 41 S. E. 952, this court, quoting from a prior case, says: "Omission to direct a new *venire facias*, or omission of any statutory essential apparent on the record, is error. . . . These provisions of the statute in respect to impaneling juries are not directory merely, but imperative. They are rules which are made essential in proceedings involving life or liberty, and it is the right of the accused to demand that they be complied with. To disregard them is to deprive the accused of that due process of law which is provided by the Legislature, and which is required by the fundamental law of the land." Further, on p. 847, it is said: "This the statute requires, and if one of the formalities which it prescribes may be disregarded, all may be set at naught."

The argument at bar has been elaborate to show the guilt of the prisoner, but if that fact was established with ever so much certainty, it would furnish no ground for removing any bar which the law has erected to protect the accused. The right of the guilty man is exactly the same when on trial as that of the innocent person, and his right to go unpunished until he is formally convicted, after making every defense to which the innocent are entitled, is one of the main pillars whereon rests our liberty and security in the pursuit of happiness. The guilty man is entitled to be convicted according to law, or in default thereof be acquitted. Hence it is, says Mr. Bishop, "that before any person can be made to suffer for a crime, he must be caught and held in the exact meshes which the law has provided; or, in other words, he must be proceeded against, step by step, according to the rules ordained by the law. It is of no avail to pursue him in a way indicated by better rules; the law's rules must be applied, or the law's penalty cannot be imposed." Bishop's *Crim. Pro.*, sec. 89; *State v. McCormick*, 84 Me. 566, 24 Atl. 938; *Hatch v. State*, 8 Tex. Ap. 416, 34 Am. Rep. 751.

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This learned author further says: "A court inquiring after the regularity of its proceedings, never asks whether or not the defendant is guilty." Sec. 92. And in section 93 he says: "The function of human law is merely to conserve the outward order of society. And a part of this order, not less essential than any other, consists in adhering to the exact methods which the law has laid down for bringing criminals to justice."

The learned Attorney-General, on behalf of the Commonwealth, insists that the act of February 10th, 1904, (Va. Code, 1904, sec. 4018) was designed to modify the rule in *Jones' Case, supra*, and to make all of the provisions of the act, as to drawing names, making out and signing the list and summoning persons named on the list, *directory*. In support of this contention the last paragraph of section 4018 is relied on, which is as follows: "No irregularity or error in drawing the names, or in making out, or copying, or signing, or failing to sign, the list, or in summoning the persons named on the list shall be cause for summoning a new panel, or for setting aside a verdict or granting a new trial, unless objection thereto was made before the jury was sworn, and unless it appears that such irregularity, error, or failure was intentional, or is such as to probably cause injustice to the Commonwealth, or to the accused."

The first writ having been quashed, and everything done in pursuance of it having, as already seen, fallen with it, neither the writ nor anything done under it could possibly contribute to the support of the second writ of *venire facias*. That writ must stand upon its own merits or fall by reason of its demerits. It was under this second writ alone that the persons who tried the prisoner were obtained. Before the jury thus summoned was sworn the prisoner made his motion to quash the writ, not because of any irregularity or error in drawing the names, for

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none had been drawn after the first writ of *venire facias* was quashed, nor for any irregularity or error in making out or copying or signing or failing to sign the list, or in summoning the persons named on the list, but because the persons summoned were taken from a list furnished *by the judge* and not from a list drawn and furnished *by the clerk*, as required by the express mandate of the statute.

The last paragraph of section 4018 has no application to the conditions here presented, and was never intended to cure or relieve the fundamental error in the mode of selecting the jury which tried the prisoner. If the paragraph relied on were given the operation suggested, it would render nugatory all the preceding part of sec. 4018 which prescribes the method of drawing and summoning a jury in a felony case. That the jury shall be drawn and furnished by the clerk, and not selected by the judge, is mandatory, and the court is powerless to deprive the accused of that right.

It seems to be thought that because the judge selected the names to be summoned from among those who had been summoned under the quashed writ, the prisoner has been done no injury and therefore has no right to complain. To this contention we cannot give our assent. It was a jury selected by the judge, which the law forbids. If the judge had selected the panel to be summoned under the second writ from any other by-standers or from among names in the box, it would have been equally as lawful as selecting such panel from among the thirty persons brought together by the first writ of *venire facias*, which had been declared null and void.

This is not, as suggested, a technical view of this matter. Jurors as triers of the fact wield far more power than the judge on the bench, in the trial of an accused person, and the Legislature has seen fit to safeguard the rights of the Common-

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wealth and the accused by the enactment of a mandatory provisions for the constitution of this important branch of the judicial system, which the courts are not at liberty to disregard, even if they deemed it expedient to do so.

Our conclusion is that the plaintiff in error has been tried by a jury selected by the judge without authority of law; has been deprived of the drawn jury prescribed by the statute, which was his right; and, therefore, has not had that fair and impartial trial which is guaranteed to him by the law.

The questions raised by the other assignments of error will not necessarily arise again, and, therefore, they are not dealt with in this opinion.

For these reasons, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with the views expressed in this opinion.

Reversed.

Statement.

Richmond.

JOHNSON V. COMMONWEALTH.

January 25, 1906 .

1. CRIMINAL LAW—*New Trial—Evidence Certified—Rule of Decision.*—Where the evidence in a criminal case is certified, and not the facts, the case is heard in this court as on a demurrer to the evidence by the plaintiff in error.
2. CRIMINAL LAW—*New Trial—After-discovered Evidence.*—In order to justify the granting of a new trial on the ground of after-discovered evidence, the evidence must have been discovered since the trial. It must be evidence that could not have been discovered before the trial by the exercise of ordinary diligence. It must be material in its object, and such as ought, on another trial, to produce an opposite result on the merits, and it must not be merely cumulative, corroborative or collateral.
3. CRIMINAL LAW—*New Trial—After-discovered Evidence—Case at Bar.* In the case at bar the evidence as to the identification of the prisoner as the perpetrator of the crime charged in the indictment is very unsatisfactory, and the uncontradicted testimony of a detective, who was examined for the State, as to material facts tending to connect the prisoner with the commission of the crime, must have produced upon the minds of the jury impressions very injurious to the prisoner. The discovery after the trial of an intelligent, disinterested witness of high character, whose testimony, if true, indicates a purpose on the part of the detective to compass the conviction of the accused upon fabricated evidence, renders it proper to grant a new trial for after-discovered evidence.

Error to a judgment of the Circuit Court of Henrico county, on an indictment for rape.

Reversed.

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The opinion states the case.

Edgar B. English, for the plaintiff in error.

Attorney-General Wm. A. Anderson, for the Commonwealth.

WHITTLE, J., delivered the opinion of the court.

At the June term, 1905, of the Circuit Court of Henrico county, the plaintiff in error, Austin Johnson, was indicted, tried and convicted of the crime of rape, alleged to have been committed by him upon the person of a female child of the age of ten years; and his punishment was fixed by the jury at death.

The prisoner moved the court to set aside the verdict and grant him a new trial on two grounds: (1) Because the verdict was contrary to the law and the evidence; and, (2) for after-discovered evidence. But the court overruled the motion, and pronounced judgment upon the verdict, to which judgment a writ of error was awarded by this court.

The evidence in the case (not the facts) having been certified in accordance with the injunction of section 3484, Va. Code, 1904, the rule of decision in this court in considering the evidence must be as on a demurrer to the evidence. The effect of that rule is too familiar to demand repetition, and conformably to its requirement we feel constrained to sustain the action of the trial court in overruling the motion of the prisoner to set aside the verdict of the jury on the ground that it was contrary to the law and the evidence.

But, in that connection, it is proper to observe, that while in obedience to the explicit mandate of the statute we have been obliged to uphold the ruling of the court upon the first assign-

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ment of error, nevertheless we are painfully conscious of the unsatisfactory state of the proof with regard to the identification of the prisoner as the perpetrator of the atrocious crime of which he stands convicted. This allusion to the inconclusive character of the evidence on behalf of the Commonwealth upon that subject is rendered pertinent by reason of the correlation of the two assignments of error.

In considering the last assignment, it will not be necessary to examine all the evidence in the case, but only such parts of it as tend to make clear our reasons for the conclusion which we have reached.

It appears that the crime was committed about dusk on May 6, 1905; and upon a general description, given by the child, of her assailant, that he was a dark man with thick lips, and wore a black slouch hat, a dark blue shirt with black pearl buttons, a dark coat, and shoes with large holes in the tips, the accused was arrested that night and taken into the presence of the child for identification. She was twice asked if he was the guilty party, and each time indicated by a shake of her head that he was not. Thereupon, the officers, having learned that a small negro girl, Cornelia Horsley, was in company with the child at the time she was enticed into an alley-way by her assailant, (upon the pretext that his sister wanted to buy some of the cologne that she was peddling) took the prisoner to her home, and on being interrogated as to whether he was the man who lured the child off, she replied: "No, that is not the man, that is Austin Johnson. The man who met us this evening was a tall, black man, who had on a black slouch hat and gray coat and blue shirt, dark pants and tan shoes." It was also in evidence that Austin Johnson was well known to Cornelia Horsley, having formerly been in her father's employment—a circumstance which adds to the probative value of her testimony

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on the question of identification, and renders improbable the theory that the prisoner would have enticed his victim from the presence of a person to whom he was thoroughly known, and whose testimony he might reasonably have anticipated would lead to his detection and conviction. After hearing the statement of Cornelia Horsley, the officers naturally concluded that a mistake had been made and released the prisoner. Subsequently, however, on the same night, one of the officers received information that the child had said that she was frightened when Johnson was brought in her presence, and wanted to see him again, and believed that he was the man who assaulted her. On the following morning two detectives went to the child's home, and learning that she believed Johnson to be the guilty party, they set out to arrest him. They discovered the accused in a shanty at a brick-yard in the vicinity, where he was accustomed to stay at night with a friend, lying, as they say, in a bunk, and feigning to be asleep. Continuing, one of those detectives testified that while his companion had gone to the house of the owner of the brick-yard to telephone for the patrol wagon, he observed the accused get up from the bunk where he was lying and go to the fire-place and kindle a fire; that he then went to the corner of the room, pulled down some cloth from the loft above, which looked like a garment of some kind, made a bundle of it, put it in the fire and burned it up—"He burned two pieces, dirty looking, looked like a shirt or two shirts. It might have been two pairs of drawers." The witness exhibited to the jury two pieces of burnt cloth, one piece about the size of a quarter of a dollar, and the other some two inches square, which he testified that he had extracted from the ashes of the fire made by the prisoner. Another witness for the prosecution, who claimed to be an expert on the subject, stated that, in his opinion, the burnt pieces of cloth were "either

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the ribs of a pair of balbriggan drawers, or the ribs of an underwear shirt." Soon after the alleged burning of these articles the officers appeared on the scene, and arrested the accused and handcuffed him; and he was again taken into the child's presence and identified by her as her assailant. He was indicted June 3, 1905, and a week later put upon trial.

After his conviction, the prisoner made affidavit that since the trial he had discovered material evidence affecting the merits of the case, which he could not have obtained by due diligence before or during the trial; and also filed affidavits of a number of persons setting forth the after-discovered evidence upon which he relied. We shall only notice the affidavits of two of these witnesses, J. T. Herrin and W. J. Ready.

The affidavit of Mr. Herrin is to the effect that he is the managing overseer of the "West End Brick Yard," located near the "New Reservoir;" that a private detective came to his residence on Sunday afternoon, May 7, 1905, and requested affiant to accompany him to a shanty some thirty or forty yards distant, where he desired him to see a negro, who was there asleep, and ascertain if he belonged in the yard; that he (the detective) thought he was the same negro who was suspected of having perpetrated a rape upon a little white girl the day before; that affiant found the accused lying on a bunk asleep, and awoke him and asked what he was doing there. The affidavit proceeds: "I will state most positively that there was no fire of any kind in the shanty house, and that there were no signs of any fire having been there; and that nothing was said by Johnson (the detective who testified about the accused burning the bundle of underwear), or any one else about there having been any fire there. I remember distinctly that the prisoner accompanied the officers very willingly, making the remark, 'Yes, I will go anywhere with you,' addressing the officers. . . .

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That on the next day, Monday, Duke and Johnson (the detectives) came to the yard and requested permission to go into said shanty house. The key was in my possession, and I accompanied them to the said house, and into the same; that they examined into a small accumulation of old ashes in the fire-place—a large open fire-place—and took therefrom a piece of burnt cloth, which resembled a piece of burnt ribbon, and which they said was a piece of necktie; that is all they took from the fire-place. I know nothing of any burned pieces of underwear found there that day, and taken from the fire-place. There were certainly no burnt pieces of underwear found that day, and none to my knowledge in the fire-place.”

Affiant W. J. Ready, the proprietor of the brick-yard, deposed, that he had known J. T. Herrin for ten years; that he had been in his employment as managing overseer of his brick-yard and plant for fifteen months; and that he is a man of “the highest integrity of character.”

The rule governing the granting of new trials for after-discovered evidence is well settled by the authorities in this jurisdiction, and is succinctly stated in the case of *Nicholas v. Commonwealth*, 91 Va. 741, at page 753, 21 S. E. 364, at p. 368, as follows:

“1st. The evidence must have been discovered since the trial. 2nd. It must have been evidence that could not have been discovered before the trial by the exercise of reasonable diligence. 3rd. It must be material in its object, and such as ought, on another trial, to produce an opposite result on the merits. 4th. It must not be merely cumulative, corroborative, or collateral.” 4 Min. Inst. Pt. 1, 758, 759; *Wynne v. Newman's Admr.*, 75 Va. 817; *Whitehurst v. Comth.* 79 Va. 556. See to the same effect the cases collected in a note to *St. John's ex'ors v. Alderson*, 32 Gratt. (Va. Rep. Ann.) 140.

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Applying these principles to the case in judgment, we are of opinion that the accused is entitled to new trial.

The injurious impression that must have been wrought upon the minds of the jury, in their effort to reconcile the conflicting evidence in respect to the identification of the prisoner as the guilty party, by the uncontradicted testimony of the detective, that the day after the crime was committed the accused was discovered in the act of burning his underclothing, the condition of which it was believed would incriminate him, can hardly be overstated. And, conversely, the testimony of an intelligent, disinterested witness of high character, which, if true, indicates a purpose on the part of the detective to compass the conviction of the accused upon fabricated evidence, would reasonably have exerted a favorable influence with the jury in his behalf.

Inexpressibly horrible as was the crime perpetrated upon this unfortunate child, it would be still more baleful to endeavor to expiate it either by taking the life of an innocent man, or of one whose guilt had not been established with that degree of certainty which the law in its wisdom has ordained.

For these reasons, the verdict of the jury must be set aside, the judgment of the Circuit Court reversed, and the case remanded for a new trial.

Reversed.

Syllabus.

Richmond.

ROBINSON V. COMMONWEALTH.

February 2, 1906.

1. **EMBEZZLEMENT—Public Funds—Justice of Peace—Fines—Code, Secs. 723, 3717.**—An indictment which charges that a justice of the peace, by virtue of his office, had the custody of five dollars of the public funds of the State, which he was required to pay to the clerk of the Circuit Court of his county, and that he feloniously and knowingly did misuse and misappropriate, and feloniously and knowingly disposed of the same otherwise than by paying the same over to said clerk, in accordance with law, and concluding with a charge of larceny and embezzlement, is a sufficient indictment for a felony under section 3717 of the Code. This section is directed against the fraudulent and felonious misuse and misappropriation of public funds by an officer of the State, and the indictment in this case is under this section and not under section 723, which imposes a forfeiture upon justices of the peace who simply fail to pay over such funds within thirty days, but without such intent.
2. **JURORS—Qualifications—Opinions.**—Whether a juror is disqualified to sit or not by reason of his opinion as to the guilt or innocence of the accused must depend upon the character of that opinion as shown by the facts of the particular case. No fixed and invariable rule can be laid down on the subject, but great weight should be attached by the appellate court to the opinion of the trial judge.
3. **EVIDENCE—Relevancy—Misappropriation of Funds—Like Acts by Others.**—A justice of the peace on trial for embezzling public funds, cannot testify as to the practice of other magistrates and police officers in the neighborhood as to retaining public funds contrary to law. The fact that they violated the law would furnish no justification or excuse to him.
4. **EMBEZZLEMENT—Restoration of Funds.**—The restoration of public funds embezzled by an officer can not relate back so as to efface the prior completed crime.

Statement.

5. INSTRUCTIONS—*Surplusage*.—It is not error to strike out of an instruction words which, though the same as found in the indictment, are mere surplusage.
6. CRIMINAL LAW—*Venue—Proofs*.—To bring a crime within the jurisdiction of a Circuit Court, it is only necessary to show that the offense was committed in the county over which the court has jurisdiction. The magisterial district need not be alleged or proved.
7. EMBEZZLEMENT—*Proof of Less Sum than Charged*.—On a charge of embezzlement of a given sum it is not necessary to prove the embezzlement of the whole sum charged in the indictment.
8. INSTRUCTIONS—*Sufficiently Instructed*.—It is not error to refuse a proper instruction on a given point, when a correct instruction covering the same point has already been given.
9. CRIMINAL LAW—*Inaccurate Statement in Argument*.—A verdict and judgment in a criminal case will not be set aside for an incorrect statement of the law by the prosecuting attorney in the course of his argument, where it appears that the jury was correctly instructed on the law of the case, and the objectionable statement was separated and segregated from the context, and the trial judge, who heard the whole argument, certifies that the accused was not prejudiced by the language used.
10. NEW TRIAL—*Case at Bar—Evidence Sufficient to Sustain Verdict*.—The evidence in this case is sufficient to sustain the verdict of the jury finding the accused guilty of knowingly misusing and misappropriating public funds of the State in his custody by virtue of his office of justice of the peace.

Error to a judgment of the Circuit Court of Warwick county on a prosecution for embezzlement. To a judgment of conviction defendant assigns error.

Affirmed.

The opinion states the case.

C. C. Berkeley and *F. S. Collier*, for the plaintiff in error.

Attorney-General William A. Anderson, Jno. B. Lightfoot, Jr., and Ashby & Read, for the Commonwealth.

KEITH, P., delivered the opinion of the court.

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An indictment was found in the Circuit Court of Warwick county against Charles H. Robinson, which charges that he, being a justice of the peace of Newport Magisterial District in said county, by virtue of his office aforesaid, had the custody of a certain sum of money, public funds of the State of Virginia, to-wit, the sum of five dollars, which he was required by law to pay to the clerk of the Circuit Court of the county, aforesaid, and which he "feloniously and knowingly did misuse and misappropriate . . . and did then and there feloniously and knowingly dispose of the said money and public funds otherwise than by paying the same to the clerk of the Circuit Court of Warwick county, Virginia, in accordance with law, and so the jurors aforesaid, upon their oath aforesaid, do say that the said Charles H. Robinson then and there, in manner and form aforesaid, feloniously and knowingly did steal, take, embezzle, and carry away, the said money and public funds aforesaid, to-wit, the sum of five dollars, currency of the United States, of the value of five dollars, the money and public funds of the State of Virginia. Against the peace and dignity of the Commonwealth of Virginia."

There was a motion to quash, and a demurrer interposed to this indictment. We deem it necessary to consider only the demurrer.

The plaintiff in error contends that the indictment is based upon section 723 of the Code, which provides:

"If any fine is received by the justice imposing it, he shall pay the same, with the cost, within thirty days thereafter, to the clerk of the Circuit Court of his county or Corporation Court of his city. For failure to make such payment within said time, without good cause, he shall forfeit twenty dollars, which, together with the money so received, may be recovered by motion."

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This statute fixes the duty of the justice. When he imposes and collects the fine, he must, by its terms, pay the same, together with the costs, within thirty days to the clerk of the court of his county or corporation; and for failure to make such payment he forfeits twenty dollars, which may be recovered from him by motion, together with the money so received. But that is not the offence with which plaintiff in error was charged. He was prosecuted under section 3717, which is as follows:

“If any officer, agent, or employee of the State or of any city, town or county, or the deputy of any such officer, having custody of public funds, knowingly misuse or misappropriate the same, or knowingly dispose thereof otherwise than in accordance with law, he shall be confined in the penitentiary not less than one nor more than ten years, and if any default of such officer, agent, employee, or deputy in paying over said funds to the proper authorities when required by law to do so shall be deemed *prima facie* evidence of his guilt.”

The two sections are wholly dissimilar. The first refers to the failure to pay over; the second to the knowing misuse or misappropriation of the funds of the State. It is true that the detention of the money is one of the elements constituting the offense punished under section 3717, but it does not constitute the offense itself; for money may be detained without being misappropriated, which is the evil for which section 723 was designed as a remedy. But it may also be detained with fraudulent and felonious intent to misuse and misappropriate, which brings the case within the terms of section 3717.

We are of opinion that the indictment is sufficient, and that the demurrer was properly overruled.

While the jury were being selected for the trial of this case, plaintiff in error challenged one of the veniremen who had been

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sworn upon his *voir dire*, and asked him if he had not at a time and place named in the question, said "Charley Robinson don't want me to sit on any jury that tries him, and would know that he is a goner if I sit on any jury that tries him." To which the juror replied that he had made such a statement, and meant that if the evidence was as strong in this case as it was in the one before the grand jury on which he sat when Robinson was indicted on a former occasion he would convict him. The grand jury here alluded to was not connected at all with this prosecution. The court then asked the juror if there was any impression on his mind made by what he had heard about the accused, or by what he had heard on the grand jury in the case referred to that would require evidence to remove it; to which he replied that there was not, but that he could give the accused a fair and impartial trial without reference to what he had heard about the accused either on the grand jury or otherwise. Thereupon the juror was received by the court, and the plaintiff in error excepted.

This subject was recently considered by this court in the case of *McCue v. Commonwealth*, 103 Va. 870, 49 S. E. 623, and the conclusions reached are thus stated in the syllabus: "The trend of recent decisions is in the direction of limiting rather than extending the disqualification of jurors by reason of mere opinion, hence the courts enquire into the character of that opinion. If it is a decided or substantial opinion as to the guilt or innocence of the accused, no matter upon what ground it was formed, the juror is incompetent, but if the opinion is merely hypothetical, and the court is satisfied from an examination of the juror on his *voir dire*, or otherwise, that he is not biased or prejudiced, and that he can give the prisoner a fair and impartial trial according to the law and the evidence, he should be accepted. No fixed and invariable rule can be laid

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down whereby to test the competency of jurors, but each case should be determined by its own facts and circumstances, and great weight should be attached by an appellate court to the opinion of the trial judge."

Applying this principle to the case before us, we are of opinion that there was no error in the ruling of the Circuit Court.

The third assignment of error is to the exclusion of certain evidence offered by the accused.

The bill of exception is as follows: "That at the trial of this cause, after the accused had been arraigned and the jury impaneled to try the issue, and while the accused was testifying in his behalf, relative to the reasons why he had not paid the fine and the costs, shown in the evidence, to the clerk of the court, he started to state that it was his practice and that of other magistrates and police officers down there. To further testimony along this line the Commonwealth here objected, by counsel, which objection the court sustained, to which ruling and opinion of the court in sustaining the said objection the accused by his counsel excepted, and tenders this bill of exception which he prays may be signed," etc.

If the prisoner's conduct was in accordance with the law, it did not need to be supported by the practice of others; if it was not in accordance with the law, the fact that others violated the law would furnish no justification or excuse to him. We see no merit in this assignment of error.

After the evidence was introduced, the court, at the instance of the Commonwealth, gave the jury two instructions. The first instruction is as follows:

"The court instructs the jury that a payment made to the clerk thirty days after the receipt by a justice of public funds does not excuse a crime, if any, committed because of the failure of an earlier payment."

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If the crime was complete; if the prisoner had knowingly misused or misappropriated the funds of the State, his subsequent restitution of the fruits of his crime could not relate back so as to efface the wrong.

The second instruction is, "that the law requires that a justice of the peace, within thirty days after the receipt of any fine imposed by him, do pay such fine, with the cost, to the clerk of the Circuit Court of his county. And if the jury shall believe from the evidence that C. H. Robinson, while a justice of the peace for this county, received a fine of \$5.00 of Charlie Sacriensce imposed by him as such justice, and instead of paying the same within thirty days after such receipt by him (Robinson) to Mr. Burnham, clerk, knowingly misused or misappropriated the same, or knowingly disposed thereof otherwise than in accordance with the law, it is the duty of the jury to find him guilty, and to fix his confinement in the penitentiary at not less than one nor more than ten years."

This instruction raises again the question considered with respect to the demurrer to the indictment. It is a correct statement of the law as set out in sections 723 and 3717, in the first of which it is made the duty of officers to pay over the fine within thirty days after its receipt, and in the last of which the knowing misuse or misappropriation of public funds is made a felony, punishable by confinement in the penitentiary for not less than one nor more than ten years..

The plaintiff in error offered certain instructions, numbered 1, 2, 3, 4 and 5, the second of which was given without objection. The fourth, as offered, is in the following words:

"The court instructs the jury, that unless they believe from the evidence that the accused knowingly misused or misappropriated, or knowingly disposed of otherwise than in accordance with law, a fine of five dollars, collected by him as justice of

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the peace of Newport Magisterial District in the County of Warwick, which five dollars were funds of the State of Virginia, as alleged in the indictment, then they must find him not guilty."

The court struck out the words "Newport Magisterial District in," and to this action plaintiff in error excepted.

It is true that the words stricken from this instruction are found in the indictment, but they were not material, may be regarded as surplusage, and their rejection was not harmful. To bring the crime within the jurisdiction of the court it is only necessary to show the county in which it occurred, that county being one over which the court has jurisdiction.

Instructions 1, 3 and 5 were refused.

Instruction No. 1 made the guilt of the accused to depend upon his having misappropriated the full amount of five dollars, and would have required an acquittal, although the evidence had shown the misappropriation of a part of it.

The third instruction directed the jury to acquit, unless they found from the evidence that the accused was a justice of the peace for Newport Magisterial District, in the county of Warwick, on the 15th day of August, 1904, as alleged in the indictment; and presents the question already considered in disposing of the modification of instruction No. 4.

The fifth instruction is as follows: "The court instructs the jury, that before they can find the accused guilty of the charge alleged in the indictment they must believe that he knowingly, feloniously, and with an intent to defraud the State of Virginia, misused, misappropriated, or disposed of otherwise than in accordance with law the five dollars, or funds of the State of Virginia, as in the indictment alleged."

In legal effect, the instruction, as offered by plaintiff in error, is the equivalent of that given by the court in which the

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jury were told, that to constitute the crime with which the plaintiff in error was charged, they must believe from the evidence that he, while a justice of the peace of Warwick county, had knowingly misused or misappropriated a fine imposed by him as such justice.

The next assignment of error is, that the attorney for the Commonwealth, in the course of his argument before the jury, used the following language: "That if the accused knowingly disposed of the fine or any part of the same, like keeping it and putting it in bank, otherwise than by paying it to the clerk of the court within thirty days, is a violation of the law and the accused should be convicted as charged in the indictment;" to which the accused, by counsel, objected, which objection the court, being of the opinion that the accused was not prejudiced by the words objected to, they being simply a detached part of the argument, overruled, to which ruling of the court the accused, by counsel, excepted.

As we have said in discussing another branch of the case, the detention of the money is a part, and a necessary part, of its misappropriation. Detention does not necessarily constitute misappropriation, but there could be no misuse or misappropriation without detention; though it is true that detention that continues for thirty days, standing alone, would not complete the offence under section 3717. We have found that the jury was properly directed by the court, and we cannot think that in the face of proper instructions the jury could have been misled to the prejudice of the prisoner by a remark made by the prosecuting attorney, which the court certifies was "a detached part of the argument." That is to say, we are asked to reverse the judgment of the court because a sentence, separated and segregated from its context, is an incorrect statement of the law, when the court which heard the whole address

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of counsel, and was in a position to consider it, not in its disjointed parts, but as a whole, certifies to us that the accused was not prejudiced by the language used. We are of opinion that this assignment of error should be overruled.

The last assignment of error is to the refusal of the court to set aside the verdict as being contrary to the evidence and in arrest of judgment.

The facts show that the plaintiff in error was a justice of the peace for Warwick county; that he issued a warrant charging Charles Sacriensce with a misdemeanor; that on August 13, 1904, he entered judgment of conviction; that the fine imposed was five dollars; and that this fine had been paid to him in his capacity as a justice of the peace. These facts appear from the testimony of the clerk of the Circuit Court of Warwick county, and the report sheet furnished him by the accused. Plaintiff in error, who was sworn in his own behalf, testifies that on Sunday, the 14th of August, Charles Sacriensce was arrested on a warrant issued by him, and brought to the station house, where he bailed him, charging him sixty cents for it, that the accused put up five dollars collateral for his appearance the next day; that he did not appear the next day and witness had never seen or heard of him since; that witness took from the five dollars the fees of the constable, amounting to \$1.70, and his own fees amounting to \$1.00, the clerk's fees of \$1.25, and the \$1.05 due the State, and that he afterwards wrote up a mittimus for the man, and credited upon the back of the mittimus the \$5.00 collateral; and that he deposited in bank the \$1.05 due the State and the \$1.25 due the clerk. He then tendered the \$1.05 due the State, and stated that he was ready to pay to the clerk anything more due the State by him. He stated that he had always intended to pay what he had of this fine to the clerk, and certainly would not have made a report of

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it if he had intended to steal it; that he knew better than that; that he wanted to collect the balance of the fine but Charlie Sacriensce never was found; that he never did try and convict the defendant; and that his report was wrong in showing that he fined him \$5.00. At this point in the examination of Robinson, the attorney for the Commonwealth handed him a warrant, which was in the following words and figures:

"Whereas, John A. Williamson, acting chief of police of the said county, has this day made complaint and information on oath before me, C. H. Robinson, a justice of the peace of the said county, that Charlie Sacriensce of the said county, on the 14th day of August, 1904, in the said county did unlawfully create a nuisance by indecently exposing his person by bathing in a nude condition in the James River between Dawson City and Klondike of said county in the presence of divers persons, both ladies and gentlemen, against the statutes made and provided in such cases.

"These are, therefore, in the name of the Commonwealth, to command you forthwith to apprehend and bring before me, a justice of the peace of said county, the body of the said Charlie Sacriensce to answer to said complaint, and to be further dealt with according to law.

"Given under my hand and seal this 14th day of August in the year 1904.

"C. H. ROBINSON, J. P."

(Endorsed)

Commonwealth

v.

Charlie Sacriensce.

"Warrant of arrest. Executed this 14th August, 1904, by John A. Williamson.

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"After hearing the evidence in the case the defendant Charlie Sacriensce was found guilty as charged in the warrant and his punishment ascertained to pay a fine of \$5.00 and pay costs of the prosecution. Costs \$3.95.

"This the 15th day of August 1904.

"C. H. ROBINSON, J. P."

After showing these papers to the witness, the attorney for the Commonwealth then said to him: "You said you did not try or fine this man, and this warrant and endorsement thereon show differently, how do you account for that? And the witness replied: "I did not mean to say I did not fine him. I said he was not found. That he was tried in his absence and mittimus was issued for him, but he was never found." The witness further said that the warrant was his warrant, and he entered the judgment on the back of it that he had fined Sacriensce \$5.00 and \$3.95 as costs, as appeared on the warrant.

Upon this evidence, after being instructed as we have seen, the jury returned a verdict finding the plaintiff in error guilty as charged in the indictment, and fixing his punishment at one year in the penitentiary. Upon that verdict the Circuit Court overruled a motion for a new trial and in arrest of judgment, and sentenced the prisoner, and we are of opinion that the record discloses no error.

The judgment is affirmed.

Affirmed.

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ACCORD AND SATISFACTION. See PLEADING, 3.

ACCOUNTING. See EQUITY, 9; GUARDIAN AND WARD, 2; PARTNERSHIP, 1, 2; TENANTS IN COMMON.

ACKNOWLEDGEMENTS.

Notary Public—Agent or Servant of Grantee—Competency.—The fact that the notary who takes the acknowledgment of the grantors in a deed is the clerk, agent, and employee of the trustee in the deed, and receives a salary for his services as such, does not affect his competency to take such acknowledgment and receive compensation therefor. *Scott v. Thomas*, 330.

ADMISSIONS. See EVIDENCE, 4; INSURANCE, 7.

ADVERSE POSSESSION. See EVIDENCE, 7; SPECIFIC PERFORMANCE, 2.

ALIENS. See DEATH BY WRONGFUL ACT, 1.

APPEAL AND ERROR.

1. *Amount in Controversy—Judgment for Quota of Stock.*—Where the validity of a stock subscription for more than \$300 is drawn in question by a judgment for an assessment upon said stock for less than \$300, this court has jurisdiction of a writ of error to said judgment. *Elliott v. Ashby*, 716.

2. *Appointment of Receiver—Change of Possession of Property.*—An appeal lies from a decree appointing a receiver whereby a change in the possession or control of property is required; and, where the property is in the hands of receivers of another court, a direction to the receiver to intervene in that court and apply for the possession, and to take and receive the property from the receivers of that court is a sufficient change in possession and control to warrant an appeal to this court. *Va. Pass. & P. Co. v. Fisher*, 121.

3. *Decision by Trial Court Without Jury—Reversal by Appellate Court.*—Where an action is heard by the trial court, without the intervention of a jury, and its judgment is reversed by this court, such judgment will be entered here as the trial court ought to have rendered, just as is done where the cause is heard in the trial court on a demurrer to the evidence. No new trial is awarded. *United Moderns v. Rathbun*, 736.
4. *New Trial—Admission of Illegal Evidence—Demurrer to Evidence—Case at Bar.*—As a general rule, if the admission of illegal evidence may have been prejudicial, even though it is doubtful whether it was or not, it is reversible error, but the general rule is subject to the exception that if in such case there is a demurrer to evidence, and an alternative verdict, and, after disregarding upon such demurrer such illegal evidence introduced by demurree and treating the residue of the evidence as is proper under the rules applicable to demurrers to evidence, there is plainly enough evidence to sustain a judgment for the demurree, the admission of the illegal evidence will not reverse, otherwise it will. *Lane Bros. Co. v. Bott*, 615.
5. *New Trial—Three Trials Below—Demurrer to Evidence—Reversal—On What Verdict Judgment to be Entered.*—Where there have been three successive verdicts for the plaintiff, each for a less sum than the one which preceded it, and the first two have been set aside by the trial court as contrary to the evidence, and the third is rendered on a demurrer to the evidence by the defendant, which demurrer the trial court sustained, this court, upon reversal, will enter up judgment on the last verdict, as some latitude must be allowed to the discretion of the trial court, especially when the propriety of its exercise is affirmed by a verdict on the new trial for the party to whom it was granted, or the verdict, though for the same party, is for a substantially less sum. *Citizens Bank v. Taylor*, 164.
6. *Objections Not Made Below.*—Objection that a trustee in a deed of trust was not authorized to sell because he had not been requested in writing to sell, as required by the deed of trust, or that the deed of trust was in fact a mortgage, because the trustee was interested in the debt secured, cannot be made in this court for the first time. *Lawler v. French*, 140.
7. *Order of Reference Unexecuted—Harmless Error.*—Where an order of reference has not been executed the fact that it was improperly made is not assignable error. *Reager v. Chapplear*, 14.

8. *Points not made in Trial Court—Jurisdiction of Trial Court.*—Generally a question not made in the trial court cannot be raised in the appellate court, but this rule has no application where the question involves the jurisdiction of the trial court of the subject matter of litigation. Consent cannot give jurisdiction of the subject matter of litigation, and the lack of such jurisdiction may be taken notice of by the appellate court of its own motion. *South & W. R. Co. v. Com'th*, 314.
9. *Rejecting Plea—Evidence Under Other Pleas.*—The rejection of a plea is not a reversible error, when all that could have been proved under it was admissible under other pleas which were received. *Merriman v. Cover*, 428.
10. *Refusing Continuance—When Harmless Error.*—Although it may appear that a motion for a continuance on account of the absence of material witnesses for an accused should have been granted, yet if it is subsequently made to appear that no such witnesses in fact existed, the accused cannot complain that the motion to continue was erroneously overruled, as he has not been injured thereby, and a judgment will not be reversed for an erroneous ruling that could not have been prejudicial to the party complaining thereof. *Cremeans' Case*, 860.
11. *Three Trials Below—Demurrer to Evidence.*—When there have been three trials of a case, and a verdict for the plaintiff in each of the first two has been set aside because contrary to the law and the evidence, and the exceptions duly taken, and on the third trial there is a demurrer to the evidence by the defendant which is sustained, on a writ of error by this court on the application of the plaintiff, the records of the first and second trials are before this court for review, but they are not to be considered as on a demurrer to the evidence. *Citizens Bank v. Taylor*, 164.
12. *Verdicts—Insufficient Evidence to Support.*—Although cases at law are heard in this court as upon a demurrer to evidence by the plaintiff in error, this court will not hesitate to set aside the verdict of a jury if satisfied that the evidence is plainly insufficient to support it. *Atlantic, &c. R. Co. v. Watkins*, 154.
13. *Who May Appeal—Interest.*—In order that an appeal may be successfully prosecuted, it must be shown that the appellant has been aggrieved. An infant legatee as to whom a will is declared valid, and whose legacy has been paid in full, has no interest in and cannot appeal from a decree declaring the will void as to all other parties. *Rowland v. Rowland*, 673.

14. *What Reviewable.*—When a case is properly before this court on appeal from a decree appointing a receiver, all decrees and proceedings in the case are subject to consideration and review. *Va. Pass. & P. Co. v. Fisher*, 121.
15. *Jurisdictional Limit—Change of Law before Appeal.*—A judgment for four hundred dollars was rendered by a Circuit Court in a contested action at law December 8, 1903, but the court did not adjourn till December 19, 1903. The statute reducing the minimum jurisdictional amount of this court in matters merely pecuniary became operative December 10, 1903. *Acts, 1902-'3-'4*, p. 590.

Held:

A writ of error lies to said judgment from this court. The judgment did not become final until after the statute became operative. Moreover the statute is remedial in its nature, and its language broad enough to cover judgments rendered before as well as after its passage, and the right of appeal depends upon the law in force at the time it is granted and not when the judgment was rendered. *Allison v. Wood*, 765.

See COMMISSIONER'S REPORT; CRIMINAL LAW, 2, 8.

ASSIGNMENTS.

1. *Incidents.*—The assignment of a judgment does not carry with it, as an incident, the right to sue the sheriff and the sureties on his official bond for a breach of the condition thereof occurring prior to the assignment by reason of his failure to return, in the time and manner required by law, a forthcoming bond taken upon such judgment. The right of action against the sheriff and his sureties for his failure to discharge an official duty does not constitute a security for the debt, though it may affect the value of the judgment. *Com'th. v. Wampler*, 337.
2. *Virginia Statute—New Causes of Action.*—The Virginia Statute making choses in action assignable, and authorizing an assignee to maintain in his own name any action which the original obligee might have brought, does not create any new causes of action, and has no application to cases in which there is no assignment. *Commonwealth v. Wampler*, 337.

ASSUMPSIT.

Declaration—Action for Failure to Deliver Goods.—A declaration against a common carrier for failure to deliver goods which

sets forth the consideration, the promise, and the breach, and that notice in writing was given by the plaintiff to the defendant as prescribed by the bill of lading, is good as a declaration in assumpsit upon an express contract. *Ches. & O. R. Co. v. Stock*, 97.

BAGGAGE. See **CARRIERS**, 3, 4.

BAILMENTS. See **CONTRACTS**, 3; **SALES**, 1.

BANKRUPTCY.

Provable Debts—Liability for Torts.—A claim for damages for negligently permitting plaintiff's house to be destroyed while in the possession of the defendant as tenant is not a provable debt under the acts of Congress relating to bankruptcy, and hence a discharge in bankruptcy is no answer to an action to recover such damages. Liabilities arising purely *ex delicto* are not provable under said acts. *Winfree v. Jones*, 39.

BANKS AND BANKING.

1. *Capital Stock.*—"Capital" and "Capital Stock" of a bank, while sometimes used interchangeably, are not one and the same thing. "Capital" includes the entire assets of the bank whether represented by money paid in for stock, surplus, undivided profits or other property of the bank, while "capital stock" represents only the total amount derived from the issuance of the shares of stock. *West v. Newport News*, 21.
2. *Taxation—Capital Stock.*—All legislative acts are presumed to be lawful, and are to be so construed unless the contrary plainly appears; and as the capital of banks is exempt from taxation, a city ordinance imposing a tax on the "capital stock" of banks will be construed to refer to the totality of shares of the individual stockholders which the city has the right to tax. *West v. Newport News*, 21.
3. *Taxation—Shares of Stock—Municipal Ordinances.*—A city ordinance imposing a tax on "all personal property of every description, including the capital stock of banks," is broad enough to cover a tax levied on shares of stock of a bank in the hands of a stockholder even if the use of the words "capital stock" showed an intention to tax the capital of banks.

The added words "including the capital stock of banks" give no further meaning or force to the comprehensive words which precede them. *West v. Newport News*, 21.

4. *Taxation by Cities—Shares of Stock—Valuation.*—Bank stock being assessed for taxation by the State, and cities being compelled by statute to follow that assessment, a city ordinance imposing a tax of so much on the assessed value of the "capital stock" of banks located in the city is a sufficient compliance with the statute requiring bank stock to be assessed at its market value. The term "assessed value" has reference to the assessed value for State taxation, which the city has to follow. When the State has assessed the value of bank stock for the purpose of taxation and no objection is made to that assessment, none can be made to a city ordinance which adopts it. *West v. Newport News*, 21.

BENEFIT SOCIETIES. See CORPORATIONS, 4; INSURANCE, 2, 3.

BILL OF EXCEPTION.

Bills of Exception—When to be Signed—Code, 1904, Sec. 3385.—Under the provisions of Section 3385 of the Code of 1904, in the absence of any agreement between the parties, bills of exception can only be signed during the term at which the opinion of the court is announced to which exception is taken, or in the immediately succeeding vacation within thirty days after the end of that term. They cannot be signed during a succeeding term, nor during any other vacation than that immediately succeeding the term at which the objectionable opinion was announced. The beginning of a new term, although within the thirty days, puts an end to the court's jurisdiction to sign such bills. *Hoover v. Saunders*, 783.

BILL OF LADING. See CARRIERS, 1, 2, 8; EVIDENCE, 1.

BILL OF PARTICULARS. See PLEADING, 2, 3, 4, 11.

BOOKS. See INSURANCE, 5.

BRIBERY. See CRIMINAL LAW, 1, 7.

BUILDING ASSOCIATIONS.

1. *Borrowing Member—Usury—Foreign Law.*—A contract of a borrowing member of a Building Association to pay six per

cent. interest on the money borrowed during the continuance of the loan, and the taxes and insurance premiums on the property conveyed to secure the repayment of the loan, in addition to what he undertook to pay as a stockholder to mature his stock, is not usurious under the laws of Maryland, where the dues are payable; and the contract will be upheld in this State when its enforcement is sought here. *Middle States B. & C. Co. v. Miller*, 464.

2. *Borrowing Member—Withdrawal—Mode of Settlement—Foreign Law—Enforcement Here.*—Under the laws of Maryland, which, in this case, will be enforced in this State, the amount due on the contract in suit (which is a bond given to a Building Association by a borrowing member who has since died) is to be ascertained by charging the estate of the borrowing member with the amount of the loan to him as of its date, and interest at six *per cent.*, and crediting his estate with all sums paid on the loan as of the dates of payment, whether principal or interest, and thus ascertain the balance due on the loan at the time of the borrower's death. Upon this sum there should be credited the withdrawal value of the borrower's shares of stock at the time of his death, ascertained according to the by-laws of the company, then in force for determining the withdrawal value of the stock of a borrowing member, who pays back a loan in advance of the maturity of his stock. For the balance thus ascertained, with interest thereon from the time of the borrower's death, and unpaid fines assessed against him in his lifetime, and the taxes paid by the company on the trust property, with interest thereon from date of payment, the company is entitled to a decree. *Middle States B. & C. Co. v. Miller*, 464.

3. *Conflict of Laws—Place of Performance—Building Association.*—Where the by-laws of a non-resident Building Association provide that all dues from members shall be payable at the home office of the company, which is outside of this State, a contract by a member for a loan, which is silent as to the place of payment, is a foreign contract, and is governed by the laws of the State in which the home office is located as to its validity, interpretation and effect. *Middle States B. & C. Co. v. Miller*, 464.

4. *Usury—Power of Legislature—Act of March 1, 1894.*—It is within the power of the Legislature to designate what transactions shall be subject to, and what shall be exempt from, the influence of the laws against usury. By act approved March

1, 1894, the Legislature legalized certain contracts to be thereafter made by Building Fund Associations, which had theretofore been regarded as usurious. The contract in suit was made after the passage of that act, and is within its provisions. By it a borrowing stockholder agreed to make certain quarterly payments on his stock and to pay interest on the whole sum loaned, quarterly every year until his stock was paid up in full, and this was held to be valid. *Bryan v. Augusta Building Co.*, 611.

CARRIERS.

1. *Bill of Lading—Unintelligible Characters—Meeting of Minds.*—Unintelligible characters placed on a bill of lading which convey no meaning to a person of ordinary intelligence and which are not explained to the shipper, do not bind him, nor can the court take judicial notice of their meaning, or say, as a matter of law, that the minds of the parties met as to their meaning. *Norfolk & W. R. Co. v. Harman*, 501.
2. *Bill of Lading—Limiting Liability—Reasonableness—Fair Contract—Unintelligible Characters.*—The test heretofore applied to determine the validity of a contract between a shipper and carrier limiting the amount for which the carrier may be held liable, in consideration of a reduced rate of carriage, has been, was the contract fairly entered into, and its terms just and reasonable. Even if the correctness of the test be conceded, it cannot be said to have been fairly entered into if it contains unintelligible and unexplained terms to which the attention of the shipper was not called, and which are sought to be enforced against him. *Norfolk & W. R. Co. v. Harman*, 501.
3. *Common Carrier—Contracts Against Negligence—Limiting Liability—Case at Bar—Agreed Valuation of Baggage.*—A contract with a common carrier whereby, in consideration of a reduced rate, a shipper agrees to accept an agreed value, less than the true value, of goods lost by the negligence of the carrier is invalid in this State, where it is declared by statute that "no agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid." To limit is simply to exempt *pro tanto* and hence is alike forbidden. It is immaterial that the contract was fairly entered into for a valuable consideration. It is void, not because it is unreasonable, but because the Leg-

islature has declared all such contracts invalid, whether reasonable or unreasonable. In the case at bar, a passenger was traveling on a mileage ticket purchased at a reduced price, and signed a contract providing that in case of loss or damage to baggage no claim should be made therefor in excess of \$100. Baggage worth \$600 was lost through the negligence of the carrier, and it was held liable for the full amount. *Ches. & O. R. Co. v. Beasley*, 788.

4. *Common Carriers—Liability for Baggage—Reasonable Time to Remove.*—A common carrier of passengers is an insurer of its passengers' baggage during transportation, and for such a time thereafter as affords the passenger a reasonable opportunity to remove it. What is such reasonable time depends upon the circumstances of the particular case, such as the character of the station, the opportunities afforded for delivering such baggage when called for, and the like. From this duty to safely carry and deliver, the common carrier can only be exonerated by the act of God or a public enemy. In the case at bar, a reasonable opportunity was not afforded the passenger to remove his baggage. *Ches. & O. R. Co. v. Beasley*, 788.
5. *Connecting Carriers—Liability.*—Whether a carrier is liable for the loss of goods by a preceding carrier on the route depends upon whether the carrier assumed or held itself out to the public as assuming such liability. The mere agreement to carry all freight delivered to it by the preceding carrier at an agreed rate of freight does not render the two carriers jointly liable, nor make them partners. *Ches. & O. R. Co. v. Stock*, 97.
6. *Connecting Carriers—Liability—How Averred.*—If, in an action against a common carrier to recover for a loss on a connecting line, it be averred in the declaration that the two carriers were joint contractors, and in an amended declaration this averment be omitted and nothing equivalent or akin to it be inserted, and there is a verdict against the defendant, it should be set aside, for without some such averment, or an averment of some kind to fix the liability of the defendant there could be no recovery against it, and it is impossible to tell on what count the jury found their verdict. *Ches. & O. R. Co. v. Stock*, 97.
7. *Connecting Carriers—Partners—Agents.*—A connecting carrier cannot, as a rule, be held liable for the default of the initial or other connecting carrier in the absence of a partner-

ship, agency, or some similar relation, and the relationship of the carriers must be averred in the pleadings when it appears that the loss occurred on another line. *Ches. & O. R. Co. v. Stock*, 97.

8. *Instructions Directing a Verdict—Partial Case—Carriers—Case at Bar.*—In an action to recover damages for injuries inflicted on live stock and household goods, shipped under one bill of lading containing provisions applicable only to the live stock, it is not error to refuse to instruct the jury to find for the defendant unless they believe that the provision as to live stock has been complied with. The plaintiff may be entitled to recover for his goods although the provision as to live stock has not been complied with. *Norfolk & W. R. Co. v. Herman*, 501.

9. *Loss of Goods—Damages.*—In case of loss of goods by a common carrier, the measure of damages is the value of the goods at the place of destination, with interest from the time they should have been delivered, less costs of transportation, notwithstanding the bill of lading limits liability to value at place of shipment. The limitation will be disregarded as against public policy. *Ches. & O. R. Co. v. Stock*, 97.

See CONTRACTS, 7; RAILROADS, 1.

CLOUD ON TITLE. See INJUNCTIONS, 4; PARTITION.

CODE. See STATUTES, 3.

COMMISSIONER'S REPORT.

Commissioner's Report—Questions of Fact.—This court will not disturb the finding of a commissioner on items of accounting between partners on pure questions of fact, where it appears that the commissioner has made a careful and painstaking investigation of every item of dispute, and his findings are well justified by the evidence. *Dixon v. Paddock*, 387.

See EQUITY, 11, 14.

COMPLETE RELIEF. See EQUITY, 6.

COMPROMISE. See EVIDENCE, 17.

CONFLICT OF LAWS.

Contracts—Discharge.—Upon a bond executed and payable in Maryland the Maryland law prevails as to what will constitute a discharge of the bond, though enforcement be sought in the courts of this State. *Frank v. Gump*, 306.

See BUILDING ASSOCIATIONS, 30.

CONSTITUTIONAL LAW.

1. *Construction—Former Constitutions.*—If a constitutional provision succeeds another on the same subject, and the former plainly required legislative action to become effective, while the latter is ambiguous on that subject, the courts will hold that the latter requires legislative action also. *Newport News v. Woodward*, 58.
2. *Doubts as to Constitutionality of Statute.*—A statute will not be declared unconstitutional unless its repugnance to the Constitution be plain and palpable. If sought to be avoided on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, it must be shown that such injustice is prohibited, or such rights guaranteed or protected by the Constitution; if on the ground that the statute violates the fundamental principles of republican government, it must appear that those principles are placed beyond legislative encroachment by the Constitution. Nor are courts at liberty to declare an act void, because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. *Nat'l Council v. State Council*, 197.
3. *Incorporating Cities and Towns—Special Legislation.*—Since the adoption of the present Constitution, the Legislature can, as formerly, grant charters creating cities and towns, but when such charters are granted the city or town so chartered must be organized and governed in accordance with the general laws. It cannot pass special laws conferring rights and privileges different from those prescribed by the general law, as this would be obnoxious to the constitutional provision forbidding special legislation. *Campbell v. Bryant*, 509.
4. *Interstate Commerce—Obstructing Harbors—Removal of Wrecks Action by Congress—Concurrent Jurisdiction of State.*—Conceding the paramount authority of Congress to assume ab-

solute and exclusive control over the navigable waters of the United States, still it has not chosen to exercise that power in the matter of removing wrecks from harbors within a State, and the State may, in aid of commerce, enact appropriate laws for the removal of obstructions from harbors and navigable streams wholly within its limits, when not in conflict with any act of Congress or system provided by it. The mere fact that Congress has legislated on the subject does not deprive the State of all jurisdiction in the premises. Section 19, of the River and Harbor Bill (30 U. S. Stat. at Large, p. 1154), relating to the removal of obstructions from navigable rivers and harbors is not restrictive of the power of the State to enact appropriate legislation to accomplish the same ends. *Hagan v. City of Richmond*, 723.

5. *Interstate Commerce—Removing Wrecks—Personal Liability of Owner of Vessel—Policy of Congress Exclusive—Code. Sec. 2011 Invalid.*—Inasmuch as Congress has outlined a definite policy of limiting the liability of owners of ships and vessels, lost without personal negligence on their part, to the value of the ship or vessel and “her freight then pending” (Rev. Stats. U. S. Sec. 4283, and 30 U. S. Stat. at Large, p. 1154), its enactments on this subject are paramount, and Sec. 2011 of the Code, and Sec. 8, ch. 77 of the ordinances of the City of Richmond in so far as they provide for the removal, “at the expense of the owner,” of wrecked vessels obstructing the harbor in the City of Richmond, are invalid, unless the obstruction occurred with the knowledge and privacy of such owner. *Hagan v. City of Richmond*, 723.
6. *Interstate Commerce—State Statutes—Incidentally Affecting.*—Although a State statute may incidentally affect interstate commerce, it is not necessarily an obstruction, but may be in aid of commerce and a valid exercise of the police power of the State. *Hagan v. City of Richmond*, 723.
7. *Law Void in Part—Dependent Provisions.*—Where a town charter is required to be accepted by a vote of the citizens before it becomes operative, and the chief inducement to vote for the charter is a provision therein exempting the persons and property within the town from certain taxes, which exemption is declared unconstitutional and void the whole charter will be held to be invalid. *Campbell v. Bryant*, 509.
8. *Madison Heights—Charter Unconstitutional.*—The charter of the town of Madison Heights is obnoxious to the constitutional inhibition against special legislations in numerous particulars. The time for holding elections of mayor and council-

men, the territorial extent of the jurisdiction of its mayor, and the powers of its sergeant, are all different from the provisions of the general law. Other provisions are without any general law to support them and are hence invalid, as Sec. 117 of the Constitution is self-executing so far as it prohibits special legislation, and also to the extent that it amends the charters of cities and towns so as to make them conform to the provisions of the Constitution. *Campbell v. Bryant*, 509.

9. *Municipal Indebtedness—Limit Prescribed by Constitution, Sec. 127—Code, Sec. 1039.*—The limitations of section 127 of the Constitution (1902) apply to the charters of all cities and towns which do not in terms authorize a percentage of indebtedness larger than eighteen *per cent.* of the assessed valuation of real estate in such city or town. The act of March 20, 1875, carried into the Code of 1887 as Sec. 1039 limiting the right of a city or town to create an indebtedness beyond seventeen *per cent.* of its real and fifteen *per cent.* of its personal property, was not a grant of power to cities and towns to create indebtedness to that amount, but was a limitation on their powers where none previously existed, and hence section 127 of the Constitution applies to such cities and towns and limits their right to issue bonds or other interest bearing obligations to an amount not exceeding eighteen *per cent.* of the assessed valuation of their real estate. Upon the adoption of the Constitution this act perished by reason of its repugnancy. *Robertson v. Staunton*, 73.
10. *Self-Executing Provisions.*—Whether or not a constitutional provision is self-executing is a question of intention in every case. If the nature and extent of the right conferred is fixed by the Constitution itself so that the same can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, the provision should be construed to be self-executing. *Newport News v. Woodward*, 58.
11. *Self-executing Provisions—Constitution of Va., Sec. 127.*—Constitutional provisions of a negative character are generally, if not universally, construed to be self-executing. They are also self-executing if they supply sufficient rules by means of which the right given may be enjoyed and protected, or the duty imposed be enforced. As the Legislature could not authorize a city or town to contract indebtedness beyond the limit prescribed by sec. 127 of the Constitution, no legisla-

tion is needed to put that section of the Constitution into operation, and it operates *proprio vigore*. *Robertson v. Staunton*, 73.

12. *Unconstitutional Law—Effect of Passage.*—An unconstitutional law confers no rights; imposes no duties, affords no protection, and is, in legal contemplation, as inoperative as though it had never been passed.. *Campbell v. Bryant*, 509.
13. *Virginia Constitution (1902), Sec. 120 Not Self-Executing—Suspension of Policeman.*—Section 120 of the Constitution (1902) conferring upon mayors of cities the power to suspend officers and members of the police and fire departments and to remove such officers, and also such members of said departments when authorized by the General Assembly is not self-executing, but required legislative action to render it operative. *Newport News v. Woodward*, 58.

See CORPORATIONS, 1; EMINENT DOMAIN, 2; EXECUTORS AND ADMINISTRATORS, 1; MUNICIPAL CORPORATIONS, 1; STATE CORPORATION COMMISSION; STATUTES, 2; TAXATION, 2; TELEGRAPH AND TELEPHONE COMPANIES.

CONTINUANCE. See APPEAL AND ERROR, 10; CRIMINAL LAW, 2.

CONTRACTS.

1. *Contracts in Restraint of Trade—Reasonableness—Burden of Proof.*—Generally a party who seeks to enforce a contract in restraint of trade has the burden of proof to show that the restraint is reasonable, but if the contract shows on its face that it is reasonable, and the defendant seeks to avoid it by some extrinsic matter which renders it illegal, the burden is on him to establish such illegality by clear and satisfactory evidence. *Merriman v. Cover*, 428.
2. *Conditions—Waiver.*—A contract made upon a condition precedent cannot be enforced unless the condition has been performed, or waived, or the party relying upon it is estopped from relying on it. If a waiver be relied on, it must plainly appear to have been distinctly made with full knowledge of the rights intended to be waived. *Wright v. Agelasto*, 159.
3. *Construction—Practical Construction by Parties—Case at Bar.*—If the terms of a contract are ambiguous and its proper construction doubtful, the courts will adopt the practical con-

struction, if any, placed upon it by the parties thereto. In the case at bar the practical construction placed on the contract in controversy was that of a sale and not a bailment; the seller having sworn to and had recorded a supply lien claiming that the machinery mentioned in the contract constituted supplies furnished to the seller under said contract, and the buyer having listed it as a part of his property. *Trigg Co. v. Bucyrus Co.*, 79.

4. *Construction—Practical Construction of Parties.*—Manufacturers of ice having agreed to manufacture and deliver ice at their platforms during several months, and the purchaser, when sued for failure to accept and remove the ice as manufactured, claiming that he was only bound to accept the ice delivered on the outer platform, the court will adopt that construction of the contract placed upon it by the parties themselves during the period when there was no controversy on the subject, and which is a reasonable construction, to-wit, a delivery at the platform or inner storage room. *Citizens Bank v. Taylor*, 164.

5. *Contracts in Restraint of Trade—Reasonable Restraint—Case at Bar.*—A contract in restraint of trade is valid, when founded on a valuable consideration, if the restraint imposed is reasonable as between the parties, and not injurious to the public by reason of its effect upon trade. Whether or not the restraint is reasonable is to be determined by considering whether it is such only as to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public. Upon the evidence in the case at bar, the stipulation by defendants as private individuals and owners of a steam railroad, engaged in private carriage, that no chestnut oak bark shall be shipped over their road except to the plaintiffs, unless they refuse to pay the market price therefor at their own, or any other large tannery in that county, is reasonable as between the parties and does not injuriously affect the public, and hence is valid. *Merriman v. Cover*, 428.

6. *Fraudulent Procurement—Benefits.*—Where a party is induced by the false representation of another to enter into an agreement involving the outlay of money on the faith of certain property as security therefor, and, in consequence of such representations, he is wholly deprived of the security furnished by a large part of the property, and thereby sustains a large pecuniary loss, the party making such repre-

sentations will not be allowed to claim the benefit of a stipulation in the agreement which is favorable to him and detrimental to the other party. *Cupp v. Lester*, 350.

7. *Illegality—Knowledge of Illegality—Agreement—Common Carriers.*—If the contract for the construction and operation of a railroad contains stipulations which a common carrier of freight cannot lawfully make, and it is known by the parties at the time the contract is made that the proposed road is to be constructed and operated as a common carrier of freight, such contract is illegal because contrary to public policy. It is not necessary that there should have been an agreement between the parties that the proposed road should be constructed and operated as such common carrier. *Merriman v. Cover*, 428.
8. *Parol Agreement—Water Power—Pendente Lite Deed.*—A parol agreement between the owners of opposite banks of a stream to divide between themselves in designated proportions the compensation to be received for the power furnished by the stream, whether the same should be granted by the owners or taken and appropriated against their consent, if fairly entered into between the parties, is mutually binding on them, and they may lawfully execute a deed carrying such agreement into effect pending proceeding to condemn the power. *Rankin v. Harrisonburg*, 524.
9. *Registry—Contracts With Government—Reservation of Title—Conditional Sales.*—Contracts between the government of the United States and contractors by which it is stipulated that all parts of machinery paid for by the government under a specified system of partial payments shall become thereby the sole property of the United States do not come within the category of contracts which are required to be recorded by section 2462 of the Va. Code, 1904. No title is reserved in such contracts, and there is no element of a conditional sale about the transaction. *Trigg Co. v. Bucyrus Co.*, 79.
10. *Time of Performance.*—Where a contract is silent as to the time within which an act is to be done, the law implies a reasonable time. *Merriman v. Cover*, 428.
11. *Two Constructions—One Rendering Contract Void.*—Where a contract is susceptible of two constructions, by one of which it would be rendered valid, and the other void, the former will

be given, if reasonable, as it will not be presumed that the parties intended to do that which they had no right to do. *Merriman v. Cover*, 428.

See RAILROADS, 1.

CONTRIBUTION.

Support of Grantor—Excessive Payments by one Grantee—Contribution—Parties.—Where separate deeds are made to several grantees, each in consideration of the support of the grantor and his wife, one of them who has not done more for the support of the grantor and his wife than his deed required of him has no right to implead the others for a failure to comply with the terms of their conveyances as to such support. And even where such a suit is proper, after the death of the grantor leaving his widow surviving, the widow and personal representatives of the grantor are necessary parties. *Robertson v. Wampler*, 380.

CORPORATIONS.

1. *Benevolent Associations—Incorporation—Vested Rights—Case in Judgment—Constitutional Law.*—An Act of Assembly incorporating a benevolent and patriotic association (which had previously done business in the State by comity) and granting to it the exclusive right to create and organize subordinate bodies, and which is wholly prospective in its operation and does not purport to deal with existing rights of property, is not in conflict with the Constitution of this State or of the United States. The State has the right to give to a corporation created by it for the conduct of such a business the exclusive right to create and organize subordinate bodies. *Nat'l. Council v. State Council*, 197.
2. *Charter Powers—Motives of Incorporators.*—The sufficiency of the motive inducing corporators to apply for a charter of incorporation is immaterial. The company stands upon its charter rights, and must prevail unless they are in conflict with the Constitution of the United States or of the State of incorporation. *Nat'l Council v. State Council*, 197.
3. *Diverting Assets—Suit by Stockholder.*—In order for a stockholder to maintain a suit in equity upon a cause of action existing in the corporation he must allege and prove a re-

quest or demand upon the directors, or other governing body of the corporation, or upon the stockholders where that is feasible, to institute proceedings against the wrong-doers, and their refusal after reasonable demand or request, or he must allege such facts in his pleadings as will show that it is reasonably certain that a demand for corporate action would have been useless. The fact that the wrong-doers own a controlling interest in the stock is a sufficient reason for not applying to them for redress, but it is not a sufficient reason for failure to apply to the directors elected by them. *Va. Pass. & P. Co. v. Fisher*, 121.

4. *Evidence—Constitution and By-Laws of Corporation—Knowledge of Member—Changes—Burden of Proof.*—Members of a beneficial society are presumed to know its constitution and by-laws, and, after they have been proved, if a member claims that there has been a change in them affecting his rights the burden is upon him to prove it. *United Moderns v. Rathbun*, 736.
5. *Foreign Corporations—Exclusion From State.*—A State may exclude altogether a foreign corporation from doing business within its limits, or exact such security for the performance of its contracts with its citizens as it may deem proper, where such foreign corporation is not in the employment of the Federal government, nor engaged in interstate or foreign commerce. *Nat'l. Council v. State Council*, 197.
6. *Foreign Corporations—Exclusion from State.*—A State has unlimited power to prescribe the terms and conditions upon which foreign corporations may do business within its limits, and may, if it chooses, exclude them altogether. *Standard Oil Co. v. Commonwealth*, 683.
7. *Stock Subscriptions—Action by Receiver—Defenses—Code, Sec. 1103a.*—In an action by a receiver, under Code, (1904), Sec. 1103a, to recover an unpaid stock subscription, the defendant is not confined to pleas by way of confession and avoidance, but may show that he never subscribed to or became a stockholder in the company. The object of the statute was to take away from courts of chancery the power to fix the liability of the stockholder, and to transfer all questions affecting the validity of the subscription to the courts of common law, at the same time leaving the courts of chancery the ascertainment of the indebtedness of the company, the amount necessary for its liquidation, the percentage to be paid by each stockholder, and the appointment of a receiver to collect the assessments. *Elliott v. Ashby*, 716.

8. *Stock Subscriptions—Release of Subscription—How Proved—Case at Bar.*—While a stock subscription in a joint stock company can only be released by the stockholders, or by the Board of Directors duly authorized by them, yet such release can be proved not only by the records of the company, but also by other evidence showing that such subscription was in fact not regarded by the company as binding on it, and that the subscriber was not regarded by himself or by the company as a stockholder thereof. In the case at bar, the evidence was sufficient to warrant a jury in finding that the defendant's subscription was not regarded by himself or the company as binding upon him, and the trial court should have so decided on the demurrer to the evidence by the plaintiff. *Elliott v. Ashby*, 716.

9. *Wrong Doing—Collusion of Directors—Fraud—How Charged.*—An allegation that directors are colluding with wrong-doers and will not discharge their duties is the mere expression of an opinion or conclusion. Such an allegation is a charge of fraud, and to be made the basis of relief the facts out of which the fraud arises must be alleged and proved. It is not sufficient to state the conclusion without giving the facts upon which it is based. *Va. Pass. & P. Co. v. Fisher*, 121.

See EMINENT DOMAIN, 1; EQUITY, 10, 15; STATE CORPORATION COMMISSION; TAXATION, 5, 8.

CREDITOR'S BILL. See EQUITY, 15; MORTGAGES.

CRIMINAL LAW.

1. *Bribery—Policeman an Executive Officer—Code, Sec. 3744.*—A policeman is an executive officer within the meaning of Code, Sec. 3744, making it a felony to offer any gift or gratuity "to any executive, legislative, or judicial officer." This section embraces all inferior executive officers, whose duties are for the most part ministerial. The most important powers and duties of a policeman—to execute the laws—are executive, though if they were chiefly ministerial, he would still be within the meaning of the statute. *Haynes' Case*, 854.

2. *Continuances—Discretion of Trial Court—Right to Call for Evidence—Opportunity to Prepare for Trial.*—A motion for a continuance is addressed to the sound discretion of the court under all the circumstances of the case, and, while an appellate court will supervise the action of an inferior court on

such motion, it will not reverse a judgment on that ground unless such action is plainly erroneous. This discretion, however, of trial courts, must be exercised with due regard to the constitutional guaranties of a fair and impartial trial to one accused of crime, and the right "To call for evidence in his favor." One accused of crime should be accorded a fair opportunity to prepare for his defense, and to secure the presence of witnesses, if any he has. Such opportunity is not afforded when a prisoner is forced into trial in the absence of material witnesses, by issuing a summons for the witnesses then, and assuring the prisoner that if they arrive before the verdict they can testify, and, if not, their testimony may be made the basis of a motion for a new trial. *Cremeans' Case*, 860.

3. *Crime Distinguished from Tort—Unlawful Fishing—Code, Sec. 2071.*—An act forbidden by a public statute, punishable by a proceeding in the name and for the benefit of the State, and, if the judgment is not satisfied, by confinement in jail, is a crime and not a mere tort; and, being a crime, the defendant upon conviction by a justice is entitled to an appeal. Unlawful fishing in private waters, in contravention of Code, Sec. 2071 is a misdemeanor. *Jernigan's Case*, 850.
4. *Embezzlement—Proof of Less Sum than Charged.*—On a charge of embezzlement of a given sum it is not necessary to prove the embezzlement of the whole sum charged in the indictment. *Robinson's Case*, 888.
5. *Embezzlement—Public Funds—Justice of Peace—Fines—Code, Secs. 723, 3717.*—An indictment which charges that a justice of the peace, by virtue of his office, had the custody of five dollars of the public funds of the State, which he was required to pay to the clerk of the Circuit Court of his county, and that he feloniously and knowingly did misuse and misappropriate, and feloniously and knowingly disposed of the same otherwise than by paying the same over to said clerk, in accordance with law, and concluding with a charge of larceny and embezzlement, is a sufficient indictment for a felony under section 3717 of the Code. This section is directed against the fraudulent and felonious misuse and misappropriation of public funds by an officer of the State, and the indictment in this case is under this section and not under section 723, which imposes a forfeiture upon justices of the peace who simply fail to pay over such funds within thirty days, but without such intent. *Robinson's Case*, 888.

6. *Embezzlement—Restoration of Funds.*—The restoration of public funds embezzled by an officer can not relate back so as to efface the prior completed crime. *Robinson's Case*, 888.
7. *Evidence—Admissibility—Bribery—Collateral Matters.*—On an indictment for attempting to bribe an officer by offering to pay him a sum of money to release the accused and drop the case it is not admissible to show that a young girl had been given whiskey to drink, and had had intercourse with a man at the house of the accused the previous night. Such evidence is entirely collateral to, and has no connection with, the alleged attempt to bribe the officer. *Haynes' Case*, 854.
8. *Admitting Illegal Evidence—Effect—Prejudice.*—If an accused may have been prejudiced by illegal evidence, even although it is doubtful whether he was or not, a judgment on a verdict of conviction should be reversed. *Haynes' Case*, 854.
9. *Evidence—Relevancy—Misappropriation of Funds—Like Acts by Others.*—A justice of the peace on trial for embezzling public funds, cannot testify as to the practice of other magistrates and police officers in the neighborhood as to retaining public funds contrary to law. The fact that they violated the law would furnish no justification or excuse to him. *Robinson's Case*, 888.
10. *Inaccurate Statement in Argument.*—A verdict and judgment in a criminal case will not be set aside for an incorrect statement of the law by the prosecuting attorney in the course of his argument, where it appears that the jury was correctly instructed on the law of the case, and the objectionable statement was separated and segregated from the context, and the trial judge who heard the whole argument, certifies that the accused was not prejudiced by the language used. *Robinson's Case*, 888.
11. *Instructions—Sufficiently Instructed.*—It is not error to refuse a proper instruction on a given point, when a correct construction covering the same point has already been given. *Robinson's Case*, 888.
12. *Instructions—Surplusage.*—It is not error to strike out of an instruction words which, though the same as found in the indictment, are mere surplusage. *Robinson's Case*, 888.
13. *Jurors—Qualifications—Opinions.*—Whether a juror is disqualified to sit or not by reason of his opinion as to the guilt or innocence of the accused must depend upon the character of that opinion as shown by the facts of the particular case. No

fixed and invariable rule can be laid down on the subject, but great weight should be attached by the appellate court to the opinion of the trial judge. *Robinson's Case*, 888.

14. *New Trial—After-discovered Evidence—Case at Bar.*—In the case at bar the evidence as to the identification of the prisoner as the perpetrator of the crime charged in the indictment is very unsatisfactory, and the uncontradicted testimony of a detective, who was examined for the State, as to material facts tending to connect the prisoner with the commission of the crime, must have produced upon the minds of the jury impressions very injurious to the prisoner. The discovery after the trial of an intelligent, disinterested witness of high character, whose testimony, if true, indicates a purpose on the part of the detective to compass the conviction of the accused upon fabricated evidence, renders it proper to grant a new trial for after-discovered evidence. *Johnson's Case*, 881.
15. *New Trial—After-discovered Evidence.*—In order to justify the granting of a new trial on the ground of after-discovered evidence, the evidence must have been discovered since the trial. It must be evidence that could not have been discovered before the trial by the exercise of ordinary diligence. It must be material in its object, and such as ought, on another trial, to produce an opposite result on the merits and it must not be merely cumulative, corroborative or collateral. *Johnson's Case*, 881.
16. *New Trial—Case at Bar—Evidence Sufficient to Sustain Verdict.*—The evidence in this case is sufficient to sustain the verdict of the jury finding the accused guilty of knowingly misusing and misappropriating public funds of the State in his custody by virtue of his office of justice of the peace. *Robinson's Case*, 888.
17. *New Trial—Evidence Certified—Rule of Decision.*—Where the evidence in a criminal case is certified, and not the facts, the case is heard in this court as on a demurrer to the evidence by the plaintiff in error. *Johnson's Case*, 881.
18. *Venire Facias—Who to Furnish Names—Effect of Quashing—Second Writ—Procedure—Irregularities—Code (1904), Secs. 4018, 4019.*—A circuit court judge wrote to the clerk "to summon thirty first-class men for the first day of the term to serve as venire men." The clerk drew from the box provided by law the names of thirty persons, and issued a writ of *venire facias*, directing the sheriff to summon thirty persons of his county to be taken from a list furnished him by the judge of the court, and attached the list. The sheriff executed

the writ by summoning the persons named. On the trial of a felony case, when this venire was called, the prisoner moved to quash the writ, and the court quashed it. The court then issued a second writ of *venire facias*, directing the sheriff to summon sixteen persons of his county from a list furnished him by the judge. To this writ was attached a list containing the names of sixteen persons taken by the judge from those summoned under the first writ, which had been quashed. The prisoner moved to quash this writ, but the motion was overruled. Not having secured a panel from these sixteen names, a third writ of *venire facias* was issued, summoning two additional persons whose names were taken by the judge from those present in response to the first writ, which had been quashed. The prisoner moved to quash this writ, and the list accompanying it, but the motion was overruled.

Held:

1. The first writ of *venire facias* was properly quashed, as the law requires the list to be furnished by the clerk issuing the writ and *not by the judge*, and, furthermore, the method of drawing was irregular because, when more than twenty are ordered to be summoned, the law requires that the judge shall specify the number of names to be drawn and the number of persons to be summoned, and provides that the number drawn shall not be more than four in excess of the number summoned.

2. When the first writ was quashed it was as though it had never existed, and the court was without a jury present from which to select a panel. The list was a part of the writ and when the writ was quashed, the list was annulled also.

3. The second writ should have been quashed also, as a person accused of a felony is entitled to a jury of twenty persons, to be drawn by the clerk or his deputy according to law, of whom sixteen must be summoned, whereas the writ contains the names of only sixteen persons not drawn at all, but furnished by the judge as above indicated. When the first writ was quashed the court should have proceeded *de novo* to have a jury drawn and summoned according to the provisions of Code, 1904, Sec. 4018. He had no panel to complete, and hence no right to summon by-standers. The conditions provided for by Code (1904), Sec. 4019, had not arisen.

4. The provisions of the statute in respect to impaneling juries in felony cases are not directory merely, but manda-

tory. In this case each of the writs directed the sheriff to summon persons from a list to be furnished by the *judge*, contrary to the mandate of the law, and hence was no process at all.

5. It is immaterial whether the prisoner is guilty or innocent. He is entitled to a fair and impartial trial in the mode prescribed by law, and has not had it.

6. The last paragraph of section 4018, Code, 1904, relating to certain irregularities or errors in drawing, summoning, impaneling, etc., of juries in criminal cases was never intended to cure or relieve the fundamental error in the mode of selecting the jury which tried the prisoner, and has no application to such case.

7. The prisoner was tried by a jury selected by the judge without authority of law, has been deprived of the drawn jury prescribed by the statute, which was his right, and hence has not had that fair and impartial trial guaranteed to him by the law. *Hoback's Case*, 871.

19. *Venue—Proofs.*—To bring a crime within the jurisdiction of a circuit court, it is only necessary to show that the offense was committed in the county over which the court has jurisdiction. The magisterial district need not be alleged or proved. *Robinson's Case*, 888.

See APPEAL AND ERROR, 10.

CROSSINGS. See EVIDENCE, 2; RAILROADS, 6, 7, 8, 10.

DAMAGES.

1. *Proximate Cause—When a Question for Jury—When for Court—Case at Bar.*—When there is doubt as to what damages should be considered as flowing, in a natural and continuous sequence, from an act of negligence, the question should be left to the jury, but leaving the upstairs door of an empty house unlocked is so manifestly not the proximate cause of the subsequent burning of the house by some one who had no legal right there, but who obtained access by reason of the unlocked door, that the court may so declare as a matter of law. *Winfree v. Jones*, 39.
2. *Personal Injury—Measure of Damages—"No Legal Limit"—Compensation.*—In an action to recover damages for a personal injury where the evidence does not warrant punitive damages, fair compensation for the injury suffered is the legal

limit to the damages which a jury may award, and an instruction which tells the jury that there is "no legal limit" to the damages they may award for "personal injuries" and that they are judges of the extent of the damages which, from the evidence, the plaintiff is entitled to recover, not exceeding the amount claimed in the declaration, is misleading, and it is error to give it. *Newport News P. Co. v. Beaumeister*, 744.

See CARRIERS, 9; DEATH BY WRONGFUL ACT, 3, 4; EVIDENCE, 21; NEGLIGENCE, 6.

DEATH BY WRONGFUL ACT.

1. *Aliens—Right to Sue.*—Resident alien friends are entitled to the benefits and remedies afforded by sections 2902 and 2904 of the Code, giving a right of action for death by wrongful act or neglect. The policy of our laws is to extend rather than abridge the liberal policy of the common law under which an alien friend may sue and be impleaded to the same extent as a citizen. *Pocahontas Collieries Co. v. Rukas*, 278.
2. *Contributory Negligence of Deceased—Case at Bar.*—In this action, which was to recover damages for the death by wrongful act, or neglect, conceding the negligence of the defendant, the plaintiff's intestate was guilty of contributory negligence which bars recovery. He was struck at a station by a train he intended to board. When last observed he was approaching the track diagonally. He was walking along with his head down, and seemingly in a state of abstraction. He knew the train was coming. He was going to meet it. It was plainly visible, and he had but to lift his eyes and it could have been seen and the accident have been avoided. He was a passenger and entitled to a high degree of care from the railroad company, but this did not relieve him from the duty of taking ordinary care for his own safety. *Pendleton v. Rich., F. & P. R. Co.*, 813.
3. *Elements of Damage.*—This court adheres to its former rulings as to the elements of damage which the jury may consider in assessing damages for death occasioned by the wrongful act or neglect of another, and which are embodied in instruction No. 3, given for the plaintiff in this cause. *Pocahontas Collieries Co. v. Rukas*, 278.
4. *Expectancy—Mortality Tables.*—In an action to recover damages for death by wrongful act or neglect, standard tables of mor-

talities may be introduced in evidence to show the probable expectancy of life of deceased. *Norfolk & W. R. Co. v. Spencer*, 657.

DEDICATION. See Roads, 2.

DEEDS.

1. *Construction—Case at Bar—Diminishing a Fee Simple.*—A grant by a husband to his wife in fee simple, followed by a "request and desire that the said property shall be the property of X during his lifetime, and then to descend to his children, that is, should he, X, survive" the grantor and his wife, vests in the wife a fee-simple estate. While a deed is to be read as a whole, and effect given to every part, if possible, in order to carry out the intention of the parties, yet where a fee simple is given in one part of the deed by clear, unambiguous and explicit words, it is not to be diminished or destroyed by subsequent words in the deed less clear and decisive than those which create it. *Wolverton v. Hoffman*, 605.
2. *Construction—"Heirs" May Mean Children—Case in Judgment.*—Where, from the language of a conveyance to the "heirs" of a living person, and the circumstances surrounding its execution, it appears that the grantor, in using the word "heirs" meant children, it will be so construed, although the word "heirs" is a technical word, having a definite legal signification, and, when unexplained and uncontrolled by the context, would be controlled by its strict and legal import. In the case in judgment the grant was to the heirs of a living person, describing their place of residence, and was made in consideration of natural love and affection, and required the grantee to support and maintain the grantor and his wife during life and contained other evidence that the word heirs was intended to mean children. *Robertson v. Wampler*, 380.
3. *Construction—Intention.*—In deeds as well as in wills the intention of the maker of the instrument, as gathered from all of its parts, must prevail, unless that intention is contrary to law. *Robertson v. Wampler*, 380.
4. *Construction—Intention.*—In all cases of construction of written instruments the effort is to ascertain and give effect to the intention of the parties, and the whole instrument is to be looked to for such light as it may shed upon the particular language under consideration. *Wright v. Wright*, 8.

5. *Construction—Technical Words—Intention Otherwise Manifest.*—

While technical words are presumed to have been used technically, and words of a definite legal significance are to be understood as used in their definite legal sense, yet if other expressions are used in the instrument in conjunction with such technical words which plainly indicate an intention not in accord with such technical signification, the intention will control the legal operation of the words. *Robertson v. Wampler*, 380.

6. *Description of Premises—Doubts Resolved against Grantor—Case at Bar.*—

Under a grant to A. of all and every part of a certain tract of land, which was conveyed to grantor by S. by a deed bearing a date mentioned, and recorded in a deed book specified, "to which the said grantor has legal title under the conveyances from Coleman and Haviland, the original patentees of the larger tract of land, of which said tract forms a part, the same having been described and conveyed in the said deed to the" grantor as containing by survey May 4, 1891, three hundred and ninety-one acres and 38 poles. A takes the entire tract of 391 acres and 38 poles conveyed to his grantor, and the language quoted from the old deed does not restrict the conveyance to only so much of the tract as was actually within the limits of the old grant of Coleman and Haviland, and was not intended to describe the interest or amount of land conveyed, but was used for the purpose of showing from what source the land was derived, and as a help to trace the title. This construction would have to be placed on the deed to A. even if the language left it in doubt, as, in such a case, the language is construed most strongly against the grantor. *Clark v. Roller*, 472.

7. *Grant of Estate—Subsequent Diminution—Construction.*—

An estate or interest clearly granted or given in one part of an instrument will not be diminished or destroyed by words in another part of the instrument unless the terms which diminish or destroy the estate be as clear and as explicit as those by which it was granted or given. *Wright v. Wright*, 8.

See ACKNOWLEDGEMENTS; CONTRIBUTION; JUDICIAL SALES, 1;
SPECIFIC PERFORMANCE; TRUSTS AND TRUSTEES, 2.

DEMURRER TO EVIDENCE.

1. *Rule of Decision.*—Where, upon a demurrer to the evidence, the evidence is such that a jury might have found a verdict for the demurree, the court must grant judgment in his favor. *Citizens Bank v. Taylor*, 164.

2. *Case at Bar—What Jury Might Have Found—Master and Servant—Safe Instrumentalities.*—Upon the demurrer to the evidence in this case by the defendant, the jury might have found that the explosion of the engine which caused the death of plaintiff's intestate was because it had been rendered unsafe by the removal of the drip cock which had been upon it, and that in removing it the defendant had failed in its duty to exercise that reasonable care to provide reasonably safe instrumentalities which the law imposes, and that the danger to which the plaintiff was subjected *was not* so open and obvious as to charge him with contributory negligence, and, as the jury might have so found, it was the duty of the trial judge so to have decided and to have rendered judgment for the plaintiff. *Johnston v. Moore Lime Co.*, 547.
3. *No Issue—Surprise—Setting Aside the Demurrer—Control of Court.*—If, upon the argument of a demurrer to the evidence by a defendant, after the jury have rendered a conditional verdict, it is discovered for the first time that the plaintiff, by mistake, has failed to reply to one of the defendant's pleas setting up a material defense, and the court and the plaintiff are taken by surprise, it is the duty of the court of its own motion—the whole matter being *in fieri*,—to set aside the demurrer to the evidence and the award of damages thereon, and to cause the issue to be made up on such plea, and order a new trial of the case. *Norfolk & W. R. Co. v. Coffey*, 665.
4. *Contributory Negligence—Conflicting Evidence—Case at Bar.*—In an action to recover damages for personal injuries, the burden is on the defendant to establish the contributory negligence of the plaintiff. If the jury might have found the plaintiff not guilty of contributory negligence, it is the duty of the court, upon a demurrer to the evidence, by the defendant, so to decide. In the case at bar, it is unnecessary to invoke this rule, as the servant had the right to rely upon assurances given to him by a vice principal without employing precautions which ordinary prudence might otherwise have suggested. *Lane Bros. Co. v. Bott*, 615.

See APPEAL AND ERROR, 4; NEGLIGENCE, 3.

DISCOVERY. See EXECUTORS AND ADMINISTRATORS, 2.

DISTILLERS. See TAXATION, 3.

EASEMENTS.

1. *Private Easement—Prescription—What Constitutes.*—To constitute a private easement, the use and enjoyment of what is claimed must have been adverse, under a claim of right, exclusive, uninterrupted, and with the knowledge and acquiescence of the owner of the estate, in, over, or out of which the easement prescribed for is claimed. *Terry v. McClung*, 599.
2. *Bridge—Repairs—Abandonment.*—The failure of lot owners who are entitled to the use of a bridge as an easement to their lots to keep the bridge in repair for an unreasonable length of time will amount to an abandonment of the easement, and will entitle the grantor of the easement to make such use of the materials as he sees fit. But where the bridge is still in use for some purposes, though greatly out of repair, the easement cannot be said to have been wholly abandoned, and before it is declared abandoned the users should be given a reasonable time within which to restore it to such condition as will render it safe and useful for the purpose for which it was constructed. *Oney v. West Buena Vista L. Co.*, 580.
3. *Sale of Lots—Recorded Plat—Bridge Repairs.*—Where a plat of lots showing streets, alleys, etc., and a bridge over a river, connecting the lots with an adjacent city or town, has been duly recorded as provided by the "Plat Act", and lots have been sold with reference to the plat, and purchasers have relied upon the use of the bridge as one of the main inducements to purchase, and the bridge has been constructed and thrown open to the use of the public, and has been used by it, the law implies a grant of the bridge as an easement to the property conveyed. The grantor or dedicatory of an easement, however, is generally under no obligation to make repairs. This duty rests on those who use the easement, and, if they fail to discharge it, they must suffer the inconvenience. This rule is changed only where there is a special agreement or prescriptive right to the contrary. *Oney v. West Buena Vista L. Co.*, 580.

EJECTMENT.

1. *Plaintiff's Title—Case at Bar—Sale Under Void Execution.*—Land was sold under an execution in favor of the Commonwealth and bonds given by the purchaser for the purchase price and returned by the sheriff, but not paid. Subsequently another execution was issued on the same judgment, and

levied on the same land, then in possession of the first purchaser. At this sale the first purchaser again became the purchaser and time was given him to execute the bond required by law, but he failed to do so, and the land was again offered for sale on the same day, when defendant in error became the purchaser and paid the purchase money, and the sheriff conveyed the land to him. The second purchaser then brought ejectment against the first purchaser, who offered to show the above stated facts with reference to the first sale, in order to show that the second execution was void. The trial court excluded the evidence.

Held:

1. The evidence in favor of the plaintiff is sufficient to entitle him to recover.
2. The second execution was valid, and there was no error in rejecting the offered evidence as it entirely fails to prove the satisfaction of the judgment. *Richardson v. Wymer*, 236.

ELECTION. See WILLS, 2, 3.

EMBEZZLEMENT. See CRIMINAL LAW, 4, 5, 6, 9.

EMINENT DOMAIN.

1. *Corporations—Property Already Condemned—Recent Statute—Construction.*—Prior to the recent statute, now in force, one corporation could not condemn property for its use which had already been devoted to a public use by another corporation possessing the power of eminent domain, and this right will not be extended by construction beyond the explicit requirements of the statute. *Gt. Falls P. Co. v. Gt. Falls, &c. R. Co.*, 416.
2. *Scenic Advantages—Public Use—Corporations—Virginia Statute on Condemnations.*—Scenic advantages, however great, or however much they may increase the revenues of an electric railway company chartered to transport persons and property along its line, are not a public necessity, or an essential public convenience within the meaning of the statute forbidding one corporation to condemn the property of another corporation which has the right of eminent domain. A use for mere scenic purposes cannot be said to be a public use. Moreover, to justify such condemnation it must not only appear that the land sought to be condemned is for public use, but it must

affirmatively appear that a public necessity, or an essential public convenience, requires that the land be taken, and that such land is not essential to the purposes of such other corporation. *Gt. Falls P. Co. v. Gt. Falls, &c. R. Co.*, 416.

See INJUNCTIONS, 2; WATERS AND WATERCOURSES, 1, 2, 3, 4.

EQUITY.

1. *Account of Debts—Issue as to Payment—Decree that Debt is Fraudulent—Matters Outside of Issue.*—While the validity of any demand preferred against the estate of a decedent may be controverted without pleadings and in an informal way before the commissioner charged with taking a general account of indebtedness of the estate, still where no issue is raised by the pleadings, or upon the report of the commissioner, except as to the payment of a particular debt, it is not competent for the court to declare the debt fraudulent and without consideration. The creditor could not have anticipated such a defense, and has had no opportunity to contest it. *Hall v. Hall*, 773.
2. *Allegations and Proofs—Variance—Amended Bill.*—In a court of equity as well as in a court of law, the allegations and proofs must agree. A recovery will not be allowed in a case, although proved, which differs essentially from that alleged in the bill. If, on the coming in of an answer, the complainant discovers an error in the allegations of his bill, he should correct it by amending his bill to conform to the facts. He cannot recover upon any new ground shown by the answer of which he does not avail himself by amending his bill. *Reager v. Chapplelear*, 14.
3. *Bill by Judgment Creditor Assailing Deed for Fraud—Failure of Proof—Retaining Cause.*—Upon a bill filed by a judgment creditor seeking to set aside as fraudulent a deed of trust given by the judgment debtor on his real estate, and to subject the land to the lien of his judgment, where there is a failure to establish the fraud charged, the bill should not be dismissed, but (the trust debt being due at the hearing) should be retained on the docket, and the creditor permitted to have the land sold, and to subject the excess, if any, over the deed of trust debt to the payment of his judgment. It is immaterial that the trust debt was not due at the time the creditor filed his bill. *Scott v. Thomas*, 330.

4. *Bill by Judgment Creditor—Fraudulent Deed—Complete Relief.*—A judgment creditor already properly before the court to have set aside as fraudulent a deed made by the judgment debtor, will not be turned out of court and sent to another suit to prove his debt, upon failure to establish the fraud charged, but will be given complete relief in the suit brought by him. *Scott v. Thomas*, 330.
5. *Distribution of Funds—Form of Decree—Amounts—Dates.*—In disbursing funds to creditors the decree should specify the amount decreed to each creditor, and the date from which interest is to be computed. *Lyle v. Sarvey*, 229.
6. *Enforcement of Lien—Personal Decree for Balance—Decree Against Surety—Limitation of Actions.*—Upon a bill filed by a creditor against principal and sureties in a bond, setting out the execution of the bond and praying its enforcement especially against real estate conveyed in trust by the principal for that purpose, and concluding with the usual prayer for general relief, it is entirely competent for the court to render a decree against the principal and sureties, or their personal representatives, if they are dead, for the balance due on the debt after allowing credit for net amount arising from the sale of the land. Equity having acquired jurisdiction for one purpose will grant complete relief. Moreover, the decree settles all questions as to the validity of the debt, and that it is not barred by limitation. *Turk v. Ritchie*, 587.
7. *Final Decree—Leave to Reinstate.*—Where all matters involved in a cause have been fully and finally disposed of, and the cause has been retired from the docket, the reservation at the foot of the decree of leave to any party "to reinstate the cause and seek any proper relief at the foot of this decree" does not render the decree any less final than before, and was not intended to authorize any party to have the case reheard on its merits and former adjudications of the court set aside and annulled. *Stout v. Stout*, 480.
8. *Final Decree—Proof of Debts.*—In a suit brought by executors to administer the estate of their testator, where there has been a report of a master making a tentative statement of the assets, the unpaid debts so far as ascertained, and estimated balance of assets for distribution among the legatees, a decree which, without confirming the report, directs the payment of certain specified debts and recommits the cause to the master "to take a further account of the transactions of the executors, and, if possible, to make an accurate distribution be-

tween the residuary legatees" is not a final decree, and other creditors of the testator may thereafter come in and assert their debts. *Turk v. Ritchie*, 587.

9. *Jurisdiction—Discovery and Relief—Agency Involving Trust and Confidence.*—An agent to sell land of his principal and collect the proceeds, and also to demand, sue for and collect all debts, rents, accounts and other claims which may be due to his principal, occupies a position of trust and confidence toward his principal, and where, after the lapse of many years, his accounts have become complicated by reason of collections from various sources, and disbursements for expenses and remittances to his principal, equity has jurisdiction of a bill by the principal praying for a discovery from the agent, and a proper settlement of his accounts. The remedy at law in such a case is not plain, simple and free from difficulty. *Wilson v. Miller*, 446.
10. *Jurisdiction—Property Rights—Exclusive Charter Privileges—Foreign Corporations.*—Generally courts of equity protect rights of property only, and leave to courts of law the protection of merely personal rights, but property rights may arise under a charter granted by the Legislature, and these rights are within the pale of protection of a court of equity. The exclusive right to organize subordinate bodies to raise funds for a benevolent purpose does or may involve rights of property within the protection of a court of equity, and it does not follow that a State may not prohibit a foreign corporation from coming within its borders for this purpose. *Nat'l. Council v. State Council*, 197.
11. *Master's Report—Weight—Conflicting Evidence.*—Where a commissioner returns with his report, involving controverted questions of fact, the evidence upon which it is based, the court will, upon exceptions, review and weigh the evidence, and if not satisfied with the commissioner's conclusion will overrule his findings; but the report, except as to errors apparent on its face, is taken as *prima facie* correct, and, where the evidence is conflicting, this court will not disturb the action of the trial court in overruling exceptions thereto unless the findings of the commissioner are clearly erroneous. *Hall v. Hall*, 773.
12. *Order of Reference—Partial Execution—Proof of Other Debts.* Until a decree of reference for an account of debts against the estate of a decedent has been fully executed it is entirely proper for a master before whom the reference is pending to report additional debts against the estate. *Turk v. Ritchie*, 587.

13. *Parties—Privies—Suit to Charge Administrator—Uniting Debtor of Decedent.*—Generally a distributee of an estate cannot maintain a suit against the personal representative of the decedent and another who is a debtor to the estate except under special circumstances, but where the debtor is a distributee of the estate, and a necessary party to the suit for the settlement of the fiduciary's account and a distribution of the proceeds, and it is charged in the bill that the fiduciary has not attempted to collect the debt due to his decedent's estate, and other facts are charged of such nature as would render a request to sue unnecessary, the bill may be maintained. *Reager v. Chapplelear*, 14.
14. *Specific Performance—Parties—Cross-bill—Complete Relief.*—Where husband and wife have contracted to sell their joint lands to a purchaser, who gives bond payable to the husband only, and a bill is thereafter filed by the purchaser against the husband and the heirs and distributees of the wife, asking that they exhibit their title so that the purchaser may accept it if good and reject it if bad, and no question is raised about the right of the husband to collect the whole purchase-money, either by the purchaser or the distributees of the wife, the personal representative of the wife is not a necessary party to the suit, and no prayer that the answer of the husband and distributees of the wife be treated as a cross-bill is necessary to enable the court, upon being satisfied that the title is good, to ascertain the balance due on the purchase price and give a decree therefor against the purchaser. Upon reference to a commissioner in such case to report on the condition of the title, and also to report anything else deemed pertinent by himself, or required by any party in interest, it is not error for the commissioner to report the balance of purchase money due the vendor, and where such report is confirmed by the trial court without exception on that account, no objection thereto can be raised in this court, especially when there is no suggestion of error in the calculations made or the amount reported by the commissioner. When a court of equity has once acquired jurisdiction of a cause on equitable grounds, it will go on and do complete justice between the parties. *Dunn v. Stowers*, 290.
15. *Suit by Unsecured Creditor.*—A general creditor cannot file a bill in equity to enforce a claim against a living person, or a corporation which is a going concern, unless he has first obtained a lien upon property, except where otherwise provided by statute. *Va. Pass. & P. Co. v. Fisher*, 121.

16. *When Deposition May be Read—Delay in Taking.*—A party to a suit in chancery has no right to read depositions in his favor simply because they are filed before a final decree in the cause, or before an interlocutory decree adjudging the matter controverted by the depositions. Whether testimony delayed until the hearing will be heard must depend upon a sound judicial discretion to be exercised upon the facts of the case, the nature of the evidence, the reasons given for the delay, and a variety of other circumstances. If the reading of the depositions would involve the continuance of a cause ready for hearing, a recommittal of a commissioner's report, a reopening of the case for the introduction of other testimony, and a prolongation of the controversy, when the party making the motion has had abundant opportunity to take his proof, and has, without good cause, failed to do so, the depositions should be excluded. This is especially true where the court is dealing with its own receiver. *Lyle v. Sarvey*, 229.

See APPEAL AND ERROR, 7; COMMISSIONER'S REPORT; CORPORATIONS, 3, 9; EVIDENCE, 19, 20; INJUNCTIONS, 3; LIMITATION OF ACTIONS, 5; MORTGAGES; MUNICIPAL CORPORATIONS, 1; PARTIES, 1, 2; REFORMATION, 1; RES JUDICATA; SUBROGATION; TAXATION, 4; WILLS, 4.

ESCROWS.

Delivery to Agent—Ignorance of Agency—Notice.—A deed cannot be delivered in escrow to the known agent of the grantee. If so delivered, the delivery is absolute, and the condition is void. If a deed be delivered in escrow to one who is in fact the agent of the grantee, but that fact is unknown to the grantor, an instruction to the jury that if the agent disclosed the condition to his principal it is binding on him, but if he did not disclose it and the principal entered upon the land granted in pursuance of the deed such entry is not a trespass, is not prejudicial to the grantee. *Va. Pass. & P. Co. v. Patterson*, 189.

See DEEDS.

ESTOPPEL.

1. *Estoppel in Pais—Burden of Proof—Case in Judgment.*—Estoppels in pais are not to be taken by argument or inference, but

must be certain to every intent. The burden of proof rests upon the party relying upon an estoppel, and it must be made to appear affirmatively by clear, precise and unequivocal evidence. In the case at bar, the evidence as to statements made by the maker of certain bonds, before their assignment, is not sufficient to establish an estoppel upon him to deny liability on said bonds. *Berry v. Fishburne*, 459.

2. *Estoppel by Conduct*.—Conduct will not operate as an estoppel as against one who has not been induced thereby to alter his position to his prejudice. *Terry v. McClung*, 599.
3. *Failure to Collect Debt—Change in Property Values*.—A creditor cannot be held responsible for a loss occasioned by a fluctuation in the values of his debtor's property such as a failure to enforce the collection of his debt during "the boom period." The consequences of the failure of the debtor to pay his debt cannot be visited on the creditor. *Davis v. Davis*, 65.
4. *Inconsistent Positions in Litigation—Case in Judgment*.—The facts contained in the record of this cause do not sustain the contention that appellees have assumed inconsistent positions in this litigation. The lack of proper parties to one of the suits prevented them from asserting their claim against the person, and in the time and manner it is claimed it should have been done; and the mode of procedure adopted by them has not injuriously affected or prejudiced the rights of appellants. *Davis v. Davis*, 65.

See INSURANCE, 9, 16; VENDOR AND PURCHASER, 3.

EVIDENCE.

1. *Admissibility—Construction of Instruments—Functions of Court and Jury*.—It is the province of the court, and not of the jury, to determine upon the admissibility of evidence and to construe written instruments, and it is error to refer to a jury the determination of what, if any, parol evidence which has been received without objection, is in conflict with a bill of lading introduced as the basis of the action, and to disregard it. *Norfolk & W. R. Co. v. Harman*, 501.
2. *Admissibility—Speed of Trains—Improper Test*.—In order to show the speed at which a passenger train was running which collided with a wagon and team at a public crossing, causing the injury complained of, or the distance at which an approaching train could be seen from the public road by one in a wagon, or the time required by an ordinary team to pass over

the track, it is not admissible to introduce the observations of a witness made more than thirty years before of a wagon and team going over the same crossing in front of a freight train, nor to prove the time it required a different wagon and team to go over the same crossing, nor to show the speed of another train going over the same crossing in the opposite direction. *Stokes v. South. R. Co.*, 817.

3. *Answer—Admissions—Explanations.*—Where it is sought to charge a defendant by reason of admissions made in his answer to a bill the whole answer upon that question, if used at all, must be used and taken together, and explanations given must be used in connection with the admissions made; but if answer under oath is waived, and the facts admitted are clearly proved, independent of admissions in the answer, the defendant is not entitled to the benefit of qualifying explanations contained in his answer. *Reager v. Chappellear*, 14.
4. *Conduct as an Admission—Fraud.*—A party's conduct, so far as it indicates his belief in the weakness of his case, may be used against him as an admission, subject to any explanations he may be able to make removing that significance from his conduct. In particular, falsehood is a badge of fraud, and a case which is sought to be supported by deception may *prima facie*, until the contrary is shown, be taken as a bad and dishonest case. *Neece v. Neece*, 343.
5. *Carbon Copies.*—A carbon copy of a paper made by the same impression of type as the original and at the same time (but not a letter press copy) may be regarded as a duplicate original, and may be introduced in evidence without notice to the opposite party to produce the other. *Ches. & O. R. Co. v. Stock*, 97.
6. *Consideration of Deed—Varying Written Instrument.*—Although a deed of trust to secure a note for \$2,200 recites the consideration as the satisfaction of certain liens, and the payment of certain specific debts, the true consideration of the deed may be shown by parol, and the deed, in the absence of any fraudulent intent on the part of the parties thereto, will be held as a valid security therefor. Such evidence does not tend to vary or contradict the deed. *Scott v. Thomas*, 330.
7. *Deed—Signature by Woman—Presumption as to Life of Husband.* Where a purchaser of land has been in the continuous, actual, open and exclusive possession thereof, from the date of the conveyance to him, and the conveyance is perfect on its face and no adverse claim to the land has been asserted by anyone, it will be presumed that a woman who had been married but

- who signed the deed as grantor more than thirty years ago had no husband living at the date of her conveyance. *Dunn v. Stowers*, 290.
8. *Experts—Common Knowledge—Harmless Error.*—Expert evidence touching matters of common knowledge is not admissible, but if admitted it is harmless error. *Va. Iron, &c. Co. v. Tomlinson*, 249.
 9. *Experts—Opinions.*—If the evidence tends to prove the facts hypothetically stated in a question put to an expert, he may, in a proper case, give his opinion thereon. *Va. Iron, &c. Co. v. Tomlinson*, 249.
 10. *Experts—Qualifications.*—The qualifications of a witness to testify as an expert being largely in the discretion of the trial court, the admission of such testimony will not be reviewed unless it clearly appears that the witness was not qualified. *Va. Iron, &c. Co. v. Tomlinson*, 249.
 11. *Experts—Speed of Train.*—Expert testimony as to the speed at which a train was running, or the distance within which it might have been stopped, will not be received unless based upon the operation of cars or engines of similar construction and equipment, and under like circumstances. *Wise Ter. Co. v. McCormick*, 400.
 12. *Fraud—Collateral Matters—Impeachment of Defendant—Rehabilitation—Case at Bar.*—In an action of deceit against two defendants, alleging a conspiracy to defraud the plaintiff, the record of a prior suit in chancery by other parties to set aside as fraudulent a deed made by a third party to secure a debt due one of the now defendants, on the ground of fraud, to which the now plaintiff was not a party, nor a privy to any party, is not relevant nor pertinent to any of the issues made, and cannot be admitted in evidence; but if admitted, certainly counsel who prosecuted the chancery suit should be permitted to testify that no moral turpitude was charged against or attached to said defendant, and that the charge of fraud against him was purely technical. *Murray v. Moore*. 707.
 13. *Fraud—Other Frauds—Collateral Facts—Irrelevant Matters.*—While great latitude is given to the admission of evidence where the issue is fraud, as for instance, the proof of other like frauds by the same party, at or about the same time, in order to show motive, this latitude will not be extended so as to embrace collateral facts not pertinent or relevant to the matter in issue in the suit in which it is offered, and cer-

- tainly not so as to affect one of several defendants who was in no wise connected with such other frauds. *Murray v. Moore*, 707.
14. *Hearsay—Case at Bar.*—An endorsement made by a third party on a paper offered in evidence that a particular instrumentality is used on all engines made at a certain shop, or that the instrumentality is the most effective against explosions, and is absolutely safe against injuries to workmen, is mere hearsay and is inadmissible in evidence. *Norfolk & W. R. Co. v. Bell*, 836.
15. *Judicial Notice—Law of Another State—Common Law.*—The courts of this State will take judicial notice of the fact that Maryland embraces a part of the territory of the original English colonies of America, and, in the absence of evidence to the contrary, it will be presumed that the common law prevails there. *Frank v. Gump*, 306.
16. *Negligence—Particular Acts or Omissions.*—While the plaintiff must introduce evidence from which the jury may properly infer that an injury was caused by the defendant's negligence, he is not required to point out the particular act or omission which caused the injury. *Va. Iron, &c. Co. v. Tomlinson*, 249.
17. *Offer of Compromise.*—Admissions not made "without prejudice," or when not plainly shown to have been made as a concession or sacrifice in an effort to buy peace may be given in evidence. *Ches. & O. R. Co. v. Stock*, 97.
18. *Opinion of Witness.*—A witness should not be permitted to answer questions which do not seek to elicit facts, but mere opinions upon matters upon which opinion evidence is not admissible. *Metropolitan Life Ins. Co. v. Hall*, 572.
19. *Parol Evidence—Varying Written Instrument—Mistake—Equitable Relief.*—Where there has been an omission of a material stipulation in a written instrument contrary to the intention of the parties and under a mutual mistake, equity will intervene to grant relief. *Beach v. Bellwood*, 170.
20. *Parol Evidence—Varying Written Instruments—Mistake—Equitable Relief—Reformation.*—While parol evidence will not be received to vary, alter or contradict the terms of a valid written instrument, still if it be clearly shown by proof which is entirely satisfactory that, by mistake of the draftsman, a writing does not truly set forth the agreement of the parties as previously entered into by them, equity will correct the mistake so as to make the instrument conform to the real agreement of the parties. Such mistake may be shown

by parol, but the evidence of it must be clear and convincing, and such as to leave no fair and reasonable doubt upon the mind that the writing does not correctly embody the intention of the parties. *Beach v. Bellwood*, 170.

21. *Personal Injury—Preponderance of Evidence—Prima Facie Case*.—A plaintiff in an action to recover damages for a personal injury is no more required to prove his case beyond a reasonable doubt than in any other civil action. All that he is required to do, in order to make out a *prima facie* case, is to make it appear to be more probable that the injury was the proximate result of the defendant's negligence than of any other cause. *Wood v. Southern R. Co.*, 650.
22. *Scintilla Doctrine Disapproved*.—The scintilla doctrine heretofore prevailing in this State by which the court was compelled to give an instruction if there was any evidence whatever to support it, although it might be compelled to set aside a verdict rendered in accordance therewith, is not consonant with reason, nor promotive of good results in the administration of justice. *Ches. & O. R. Co. v. Stock*, 97.
23. *General Reputation—Particular Acts—Community Opinion*.—Evidence of particular opinions and particular acts is inadmissible to prove general reputation. Adequate knowledge of the prevailing opinion as to the possession of the characteristics sought to be established is an essential prerequisite to qualify a witness to testify as to general reputation on the subject. *Allison v. Wood*, 765.

See CONTRACTS, 1; CORPORATIONS, 4, 8; CRIMINAL LAW, 2, 7, 9; DEATH BY WRONGFUL ACT, 4; EJECTMENT; EQUITY, 16; ESTOPPEL, 1; EX'ORS AND ADMINISTRATORS, 2; INSURANCE, 6, 7, 10, 15, 22, 24; MASTER AND SERVANT, 4, 5, 6; MINES AND MINING, 1, 2, 3; NEGOTIABLE INSTRUMENTS, 3; NEW TRIAL, 2, 3; PAYMENT; PRINCIPAL AND AGENT; RAILROADS, 2.

EXECUTIONS.

Limitation of Actions—Executions—Death of Defendant—Revival.

—Upon a judgment obtained against a living person no execution can issue after his death, and the right to revive by *scire facias* against his personal representative, or to maintain an action thereon, is barred by the statute of limitations at the end of five years after the qualification of his personal representative. If a lien is acquired on a debtor's choses in action by reason of a *fierti facias* issued on the

judgment against the defendant in his life-time, it is lost unless the judgment be revived as aforesaid or some action be instituted for its enforcement within five years from the qualification of his personal representative. *Spencer v. Flanary*, 395.

See EJECTMENT.

EXECUTORS AND ADMINISTRATORS.

1. *Administration—Living Person—Presumption from Absence—Code, Sec. 3373—Lack of Notice—"Due Process"—Constitutional Law.*—The grant of letters of administration on the estate of a living person, as if he were dead is absolutely void; and if it be conceded that the Legislature intended by section 3373 of the Code to authorize the courts to grant administration upon the estate of a person who was once a resident of the State and has been absent therefrom and unheard from for more than seven years, irrespective of his death, the statute is a plain violation of the due process clause of the 14th Amendment to the Constitution of the United States. A statute which authorizes the taking of an absentee's property and administering it when he is alive, without his knowledge or consent, and in a proceeding to which he is not a party, and of which he has no notice, is a clear violation of the "due process" clause of said Amendment. *Selden v. Kennedy*, 826.
2. *Title Papers—Inspection by Parties in Interest.*—While an executor named in a valid will is entitled to the custody of testator's title papers, parties in interest have the right to see and inspect them. *Neece v. Neece*, 343.

EXPERTS. See EVIDENCE 8, 9, 10, 11.

EXPRESS MESSENGER. See RAILROADS, 1.

FALSE REPRESENTATION. See FRAUD, &c.

FIRES. See RAILROADS, 2.

FORFEITURES. See INSURANCE, 2.

FRAUD AND FRAUDULENT CONVEYANCES.

Undue Influence—Case in Judgment.—The deed of trust and rental contract sought to be vacated in this suit were obtained from

the maker, a widow woman living in the country, by the beneficiary in said deed and contract, under circumstances which created upon her mind the impression that such beneficiary had it in his power to sell her property for the satisfaction of his demands, the principal part of which was barred by the statute of limitations, and that the only mode of postponing this disaster was by executing the deed and contract, and so amounted to undue influence on account of which the same should be set aside. *Kane v. Quillin*, 309.

See CONTRACTS, 6; CORPORATIONS, 9; EQUITY, 1, 3, 4; EVIDENCE 4, 12, 13; PARTNERSHIP, 3; REFORMATION 1; SPECIFIC PERFORMANCE, 1.

GROUND OF DEFENSE. See PLEADING, 11.

GUARDIAN AD LITEM. See INFANTS, 3.

GUARDIAN AND WARD.

1. *Guardian De Facto—Tenant in Common—How Chargeable.*—A father who, as tenant in common with his infant son, takes all the rents arising from that portion of the land belonging to the son, occupies the relation of *de facto* guardian to his son, and must account for such rents with compound interest thereon; and if the father conveys the property to his wife and she takes possession of the whole land and receives the entire proceeds thereof, she becomes in like manner a guardian *de facto* of the infant from the date she receives the deed and takes possession, and is chargeable in like manner. It is immaterial that the father and his wife were successively tenants in common with the son. They are nevertheless chargeable as guardians *de facto*. *Watts v. Watts*, 269.
2. *Guardian De Facto—Tenants in Common—Rents—Ascertainment of Infant's Share.*—In ascertaining the amount of rents with which the *de facto* guardian is chargeable by reason of having used and enjoyed the infant's land which the guardian held in common with his own land, if the metes and bounds of the infant's land are known and ascertained, the rents of that boundary should be fixed and charged to the guardian, and not charge him merely with the infant's proportion of the rent of the tract as a whole. *Watts v. Watts*, 269.

3. *Tenants in Common—De Facto Guardian—Improvements—Repairs.*—No credit for improvements or repairs should be allowed to a *de facto* guardian of an infant who is tenant in common of the infant. *Watts v. Watts*, 269.

HANDWRITING. See PLEADING, 15.

HARBORS. See CONSTITUTIONAL LAW, 4, 5.

HEIRS. See DEEDS, 2.

HOMESTEADS. See LIMITATION OF ACTIONS, 5.

HUSBAND AND WIFE. See MARRIED WOMEN; TRUSTS AND TRUSTEES 2.

INFANTS.

1. *Contributory Negligence—Infants—Presumption.*—There is a *prima facie* presumption that an infant under fourteen years of age cannot be guilty of contributory negligence, and an instruction which ignores this presumption should be refused. *Va. Iron, &c. Co. v. Tomlinson*, 249.
2. *Negligence—Contributory Negligence—Children—Avoiding Effect of Carelessness—Driving on City Street.*—A child five years of age cannot be guilty of contributory negligence, and if, notwithstanding its carelessness, the driver of a vehicle in a city street could, by the exercise of reasonable care in keeping a lookout, have avoided coming in contact with and injuring it and failed to do so, his master is liable. *Amer. Tob. Co. v. Palisco*, 777.
3. *Pleading—Infants—Guardian ad litem—Failure to Appoint—Effect.*—An infant can only appear and defend an action by a guardian *ad litem* duly appointed for that purpose, and the omission to appoint such guardian *ad litem* is reversible error in all cases unless it appears that the judgment is for the infant, and not to his prejudice. *Weaver v. Glenn*, 443.
4. *Process—Infants—Guardian ad litem.*—An infant can only appear and defend by a guardian *ad litem*, and proceedings against him are generally fatally defective unless the record shows that such a guardian was assigned him. If, however, it clearly appears that the decree rendered in a case to which such infant is a party is beneficial to him, the failure to ap-

point a guardian *ad litem* will not be reversible error. *Langston v. Bassette*, 47.

See APPEAL AND ERROR, 13; MASTER AND SERVANT, 4, 5, 6, 7; NEGLIGENCE, 8.

INJUNCTIONS.

1. *Condemnation of Railroad—Adequacy of Remedy at Law.*—Injunction will not lie to prevent one railroad company from instituting proceedings to condemn a part of the right of way of another railroad company as the remedy of the latter company in the condemnation proceedings is full, adequate and complete. *South. & W. R. Co. v. Va. & So. R. Co.* 323.
2. *Eminent Domain—Railroads—Consent of State Corporation Commission—Injunction—Insufficient Charges of Bill.*—The failure of a railroad company to obtain the consent of the State Corporation Commission to condemn the lands of another railroad company, as required by Sec. 1105e, cl. 52, Code, 1904, before entering thereon to make surveys preparatory to the institution of condemnation proceedings, cannot be relied on in support of an injunction granted on other grounds, where no such failure is charged in the bill. *South. & W. R. Co. v. Va. So. R. Co.* 323.
3. *Irreparable Injury—How Charged.*—An injunction to prevent an irreparable injury will not be awarded upon a bill which merely sets out the pleader's conclusions. The bill must show how the irreparable injury apprehended is to arise, by giving a full and detailed statement of the facts and circumstances and the nature and condition of his property so as to enable the court to determine the necessity for the injunction. *South. & W. R. Co. v. Va. & So. R. Co.*, 323.
4. *Threatened Cloud on Title—Inadequacy of Remedy at Law.*—A bill to enjoin the imposition of an alleged cloud on complainant's title, and not the removal of an existing cloud, must show affirmatively, not only the cloud or the threatened acts which will impose it, but also the inadequacy of the remedy at law, for if the remedy at law is adequate, a court of equity will not interfere. *South. & W. R. Co. v. Va. & So. R. Co.*, 323.

See INFANTS 1; PARTNERSHIP, 4; TAXATION, 4.

INSANE PERSON. See TAXATION, 6, 7.

INSTRUCTIONS.

1. *Abstract Propositions*.—Instructions should state the law as applicable to the particular facts which the evidence in the case tends to prove, and not mere abstract propositions of law. *Norfolk & W. R. Co. v. Bell*, 836.
2. *Conflicting Instructions*.—A defect in one instruction may be cured by a correct statement of the law in another where the court can see that, taking the instructions as a whole, the jury could not have been misled by the defect, but if two instructions are inconsistent and contradictory the verdict will be set aside as it is impossible to tell whether the jury was controlled by the good or the bad in arriving at a conclusion. *Amer. Tob. Co. v. Polisco*, 777.
3. *Conflict—Directing Verdict*.—If an instruction directing a verdict leaves out of consideration an essential view of the case, and is in conflict with another instruction, a verdict in accordance with such first mentioned instruction should be set aside, as it is impossible for the court to say whether or not the jury were controlled by the erroneous instruction. *Continental C. Co. v. Peltier*, 222.
4. *Contradictory—Effect on Verdict*.—Where contradictory instructions on a material point in a case have been given, the verdict of the jury should be set aside as it cannot be said whether the jury were controlled by the one or the other. *Ches. & O. R. Co. v. Whitlow*, 90.
5. *Directing a Verdict*.—An instruction which directs a verdict must be predicated upon *all* the material facts which the evidence in the cause proves or tends to prove. *Wright v. Agelasto*, 159.
6. *Erroneous—Presumption of Prejudice*.—A misdirection or other mistake appearing in the record is presumed to have affected the verdict of the jury, and a judgment thereon will be reversed unless it plainly appears from the whole record that the error did not affect, and could not have affected, the verdict. *Amer. Tob. Co. v. Polisco*, 777.
7. *Evidence to Support*.—Where there is direct evidence tending to show defendant's negligence, and circumstantial evidence tending to show that such negligence was the proximate cause of the injury complained of, it is not error to instruct the jury to find for the plaintiff if they believe as facts what such evidence tends to prove. *Va. Iron, &c. Co. v. Tomlinson*, 249.

8. *Evidence to Support—Ambiguity.*—An instruction should not be given when there is no evidence on which to base it, nor when it is ambiguous. *Seaboard R. Co. v. Vaughan*, 113.
9. *Evidence to Support—Case at Bar.*—It is error to give an instruction when there is no evidence tending to support it. In the case at bar there was no evidence tending to show that the lessee rescinded the contract of lease under the privilege reserved in the contract to do so upon paying a stipulated sum. On the contrary, the evidence shows that the contract was abandoned in pursuance of another clause of the contract. *Big Stone Gap Iron Co. v. Olinger*, 261.
10. *Incompleteness.*—In order that an incomplete statement of the law in one instruction may be cured by a complete statement of it in another it must appear that when the instructions are read together the jury could not have been misled by the incomplete instruction. *Continental C. Co. v. Peltier*, 222.
11. *Jury Fully Instructed.*—It is not error to refuse an instruction when the jury has been already sufficiently and correctly instructed on the point covered by the rejected instruction. *Va. Pass. & P. Co. v. Patterson*, 189.
12. *Jury Sufficiently Instructed—Additional Instructions.*—Where the instructions given, or which the court has determined to give, are sufficient to submit the case fairly to the jury, the court is under no obligation to give additional instructions, even though correct, for they are unnecessary. A multiplicity of instructions tends to mislead and confuse the jury, and should be avoided. *Seaboard R. Co. v. Vaughan*, 113.
13. *Sufficiently Instructed.*—It is not error to refuse correct instructions where the jury has already been sufficiently and correctly instructed on the points covered by the rejected instructions. *Merriman v. Cover*, 428.
14. *Refusing Erroneous Instructions—Duty of the Court.*—If an instruction is right and there is evidence to support it, it should be given. If it be equivocal it should be amended. If it be wrong in form or substance it should be rejected, and there is no obligation on the court to correct it and then give it. A party cannot, by asking an erroneous instruction, devolve upon the court the duty of charging the jury on the law of the case. *Ches. & O. R. Co. v. Stock*, 97.
15. *Sufficiently Instructed.*—It is not error to refuse an instruction, though correct, where the ruling asked has already been fully and clearly covered by another instruction given. *Newport News P. Co. v. Beaumeister*, 744.

See CARRIERS, 8; CRIMINAL LAW, 11, 12; NEGLIGENCE, 8.

INSURANCE.

1. *Accident Insurance—Proximate Cause of Death—Disease—Supervening Accident.*—The evidence in this cause shows that the deceased upon whose life there was an accident policy, died of typhoid fever three weeks after receiving a personal injury such as was covered by the policy; that two weeks before the fever developed he had so far recovered from the injury as to be able to walk about and travel on the railroad, riding part of the way in the caboose of a freight train and saying that he was getting on finely and expected to go back to work in a few days.

Held:

- There was no necessary or natural connection between the injury and the disease of which decedent died, and there can be no recovery on a policy insuring against bodily injuries effected through external, violent and purely accidental causes which should *solely and independently of all other causes necessarily result in his death*, within ninety days from the date of the accident. *Continental C. Co. v. Peltier*, 222.
2. *Benefit Society—Arrears for Dues—Forfeiture—Waiver—Case at Bar.*—The evidence in this case shows that at the time of the death of an assured he was in arrears for premiums due on his policy, which by the express terms of the policy worked a forfeiture and there is no sufficient proof of a waiver on the part of the company issuing the policy. *United Moderns v. Rathbun*, 736.
 3. *Benefit Society—Effort to Settle—Case at Bar.*—The evidence in the case at bar shows that sufficient efforts were made, without avail, to secure a settlement of the liability on the policy in suit from the order issuing it before resorting to the courts, and a sufficient compliance with the provisions of the policy requiring a presentation of the claim and the proof thereof to certain designated functionaries, and the exhaustion of all remedies within the order before taking any other proceedings to enforce payment. *United Moderns v. Rathbun*, 736.
 4. *Code, Secs. 3251 and 3252 Applicable to Procedure.*—Sections 3251 and 3252 of the Code relating to actions on insurance policies are no part of the insurance laws of this State within the meaning of the act relating to benefit societies (Acts

1897-'8, ch. 688), but simply relate to modes of procedure in a certain class of actions. *Cosmop'n. Life Ins. Co. v. Koegel*, 619.

5. *Fire Insurance—Books of Account—What Sufficient.*—The stipulation in a fire insurance policy that the assured will keep a "set of books which shall clearly and plainly present a complete record of the business transacted, including all purchases, sales and shipments both for cash and on credit," is satisfied if the books are kept in such a manner as that, with the assistance of those who kept them or understood them, the amount of the purchase and sales can be ascertained, and cash transactions distinguished from credit. The books need not be such as an expert accountant in a large business would keep, nor need they give an itemized statement of all goods purchased since the last inventory, nor of the goods sold. If they show the amount of each bill of goods purchased, when and from whom, and the amount of each day's sales, and it appears that no goods were sold on credit, it is sufficient. *Prudential Fire Ins. Co. v. Alley*, 356.
6. *Fire Insurance—Building and "Addition"—Subsequent Erections—Parol Evidence.*—Where an insurance policy covers a building and "addition", parol evidence may be received to show that at the time the policy was issued there was no "addition" to the house, but that it was agreed that an "addition" should be made at once, and that the building without the "addition" was not worth the valuation put upon it by the company's agent. This does not contradict, nor add to the contract of the parties, but merely shows that the word "addition" in the policy referred to one to be built instead of to one already in existence. *Prudential Fire Ins. Co. v. Alley*, 356.
7. *Fire Insurance—Declaration of Employee of Agent—Oase at Bar.*—Upon the evidence in this case, it is held that the person through whom the policy in suit was issued was an employee of an agent of the defendant, and that his declarations at the time the policy was issued are receivable in evidence against the company. *Prudential Fire Ins. Co. v. Alley*, 356.
8. *Fire Insurance Policy—Doubtful Language—Constructions.*—If the language of a warranty in an insurance policy is susceptible of two constructions, the words used are to be construed most strongly against the insurance company, as they

- are the language of the company, prepared by its agents, officers or attorneys. *Prudential Fire Ins. Co. v. Alley*, 356.
9. *Forfeiture of Policy—Subsequent Acts and Declarations—Estoppel.*—Any acts, declarations or course of dealing by an insurance company, with knowledge of facts constituting a breach of a condition in a policy, leading the insured honestly to think that by conforming to the terms of the policy a forfeiture thereof will not be incurred, followed by due conformity on his part, will estop the insurance company from insisting upon the forfeiture, though it might be claimed under the express letter of the policy. *Foreman v. German Ins. Ass'n.*, 694.
10. *Fire Insurance—Increase of Risk—Expert Evidence.*—It is not error to reject expert evidence offered to show that the erection of a building near the property destroyed was an increase of risk. This is a question for the jury upon all the facts and circumstances in proof, and is not a question for the determination of which expert knowledge is either necessary or proper. *Prudential Fire Ins. Co. v. Alley*, 356.
11. *Fire Insurance—Inventory.*—The "iron safe clause" of a fire insurance policy, requiring an inventory of goods to be taken within twelve months, is sufficiently complied with where it is made to appear that an inventory had been taken within the prescribed period, and that the articles not covered by the policy were accounted for as if sold for cash. *Prudential Fire Ins. Co. v. Alley*, 356.
12. *Fire Insurance—Inventory—Proof of Loss—Conflicting Evidence.*—Where the evidence is conflicting, it is for the jury to determine whether an inventory offered by the assured was accepted by the agent of the insurer as sufficient, and whether a proof of loss was furnished in a reasonable time and not later than sixty days prior to the end of twelve months from the date of the fire. *North British Ins. Co. v. Edmundson*, 486.
13. *Fire Insurance—Iron Safe Clause—Books of Account—Inventory—Warranty.*—The "iron safe clause" in a fire insurance policy by which the assured covenants and warrants that he will take an annual inventory and keep certain books of account, and upon failure to produce such books and inventories for the inspection of the insurer the policy shall be void, is a warranty, and a compliance therewith is essential to the validity of the policy. *Prudential Fire Ins. Co. v. Alley*, 356.
14. *Fire Insurance—Iron Safe Clause—Object—Books to be Kept.*—The object of the "iron safe clause" in a fire insurance

policy is to protect the insurer against fraud by requiring that in case of the destruction of the property, the insured shall furnish a set of books which will present clearly and plainly a complete record of the business he has transacted while the policy was in force, and if the compliance with the requirement be sufficient to protect the insurer against fraud, it is all that can be reasonably demanded. In the case at bar there had been no purchases and but two small sales since the inventory, taken shortly before the policy was issued, and these sales were duly entered in the book containing the inventory, which was preserved and offered in evidence at the trial. The jury, deeming the book sufficient, found for the plaintiff, and their verdict was sustained in the trial court, and will not be set aside by this court. *North British Ins. Co. v. Edmundson*, 486.

15. *Payment of Premium—Evidence.*—Where it is material to prove the date at which an insurance premium was paid, and the same person was agent of both insurer and insured, and as agent of the latter advanced the premium on a policy, a receipt subsequently given by the agent to the assured for the amount so advanced which does not purport to have been given by him in his capacity as agent of the insurer and which is shown by the agent not to have been so given, but for money advanced by him, cannot be given in evidence in an action on the policy. *Foreman v. German Ins. Ass'n.*, 694.
16. *Policy—Breach of Condition—Waiver—Estoppel.*—Mere knowledge by an insurance company of the existence of a breach of the contract of insurance does not of itself amount to a waiver, or an estoppel. There must exist, in addition to such knowledge, some positive act of confirmation, upon which, in connection with such knowledge, a waiver may be predicated, and by force of which the broken contract may be said to be revived. *Foreman v. German Ins. Ass'n.*, 694.
17. *Fire Insurance—Policy—Construction—Forfeiture.*—Courts, in construing policies of insurance, do not look for grounds of forfeiture, and, furthermore, will construe the language of policies strictly against the insurer and liberally in favor of the insured. *North British Ins. Co. v. Edmundson*, 486.
18. *Fire Insurance—Policy—Construction—Substantial Compliance.*—A substantial compliance with the requirements of a fire insurance policy, including the "iron safe clause", and the provisions as to proof of loss, is all that can be reasonably exacted. *North British Ins. Co. v. Edmundson*, 486.

19. *Fire Insurance—Proof of Loss—Sufficiency.*—Where the loss under an insurance policy on a stock of goods is total, if the proof of loss is in substantial compliance with the conditions of the policy, it will be deemed sufficient, although it fails to give the cash value of each item insured and the amount of loss thereon as required by the policy. *Prudential Fire Ins. Co. v. Alley*, 356.
20. *Fire Insurance—Proof of Loss—Effect of Failure to Furnish.*—Where no forfeiture is provided for in case of a failure to furnish proofs of loss—forfeitures being provided in case of breach of other requirements—or furnishing proofs in the specified time is not expressly made a condition precedent to recovery, the effect of the failure to furnish such proofs is merely to postpone the time of payment to the specified time after they are furnished. *North British Ins. Co. v. Edmundson*, 486.
21. *Fire Insurance—Proof of Loss—Waiver—Compliance with Policy.*—Where an insurer is given informal notice of a total loss by fire, and appears on the ground for the purpose of ascertaining the facts as to the fire, etc., and negotiations follow with reference to the payment of the loss, but he takes no steps towards such payment, and, when a formal proof of loss is tendered nine months after the fire, points out no defects therein, but indicates a purpose to contest his liability, a jury is well warranted in finding either that there has been a waiver as to the proof of loss, or that there has been a substantial compliance with the requirement of the policy in that respect. *North British Ins. Co. v. Edmundson*, 486.
22. *Fire Insurance—Value of Goods Destroyed—Opinion Evidence.*—It is not error to permit witnesses to testify as to the value of the goods destroyed, based upon what they saw in the store-house, where one of the defenses to the action on a policy to recover their value is fraud in the procurement of the policy, and fraud and false swearing after the fire. *Prudential Fire Ins. Co. v. Alley*, 356.
23. *Fire Insurance—Warranties—Code, § 3344a.*—The provisions of the Code (1904), Sec. 3344a, relating to answers to interrogatories made by an applicant for a policy of insurance, have no application to the warranties contained in the "iron safe clause" of fire insurance policies. *Prudential Fire Ins. Co. v. Alley*, 356.
24. *Evidence—Insurance Policy—Parol Evidence to Vary.*—In an action to recover on a life insurance policy, a contemporaneous

parol agreement or understanding between the agent of an insurance company who solicits the insurance and the insured as to the time and place of paying the premiums, different from that stated in the policy, cannot be given in evidence, as it varies or contradicts the terms of the written contract of the parties. *Metropolitan Life Ins. Co. v. Hall*, 572.

25. *Life Insurance—Non-Payment of Premium—Waiver by Agent—Extension of Time—Subsequent Illness.*—An insured should look at his policy and conform to it, and limitations of the agent's authority should be effective, unless the insurance company, by a course of business or otherwise, has waived the limitation on the agent's power of waiver. An agent to collect premiums has no authority to extend the time of payment of an overdue premium, and, where the policy declares a forfeiture for failure to pay at maturity and forbids waiver by agents, their agreements to extend time of payment do not, as a rule, bind the company. If the rules of the company allow the superintendent to accept premiums after maturity but before the date when a premium receipt must be returned for cancellation, provided he can certify that the former insured is in good health, the assured takes the risk of being in good health between the dates mentioned, and, if not, the superintendent has no authority to receive a premium then tendered. *Metropolitan Life Ins. Co. v. Hall*, 572.
26. *Life Insurance—Re-insurance—Code, Sec. 3251.*—Where one company, for value, contracts specifically to pay a loss sustained by another under a policy of insurance issued by it, the policy becomes the contract of the first mentioned company, and the measure of its liability to the policy holder, and section 3251 of the Code permitting a complaint instead of a declaration to be filed is applicable to an action on it. *Cosmop'n. Life Ins. Co. v. Koegel*, 619.
27. *Life Insurance—Re-insurance—Action by Policy Holder—Priority.*—Where one company, for value, contracts to pay all losses sustained or to be sustained by another by reason of policies issued by the latter, the holder of a policy issued by the latter, may sue on the policy issued to him and recover from the first mentioned company damages for the breach. The law creates the duty and supplies the needed consideration wherever one party has money or property in his hands which in equity and good conscience belongs to another. *Cosmop'n Life Ins. Co. v. Koegel*, 619.
28. *Life Insurance—Suicide—Proof Required.*—The defense of suicide, to avail, must exclude every hypothesis of accidental

death. The party making the defense has the burden of proof. It will not be presumed. The mere fact that the body of an insured is found with a pistol in his hand and a bullet wound in his head is not sufficient to prove suicide. *Cosmp'n. Life Ins. Co. v. Koegel*, 619.

29. *Life Insurance—What Constitutes—Code, Sec. 3251.*—A contract by which a benefit society agrees to pay a certain sum of money, on the death of a member, in consideration of the payment by the member of fixed sums at fixed periods, by whatever name called, is a life insurance policy within the meaning of Code (1904), Sec. 3251, permitting a complaint to be filed instead of a declaration in a formal action at law and is not a mere certificate of membership in a benefit society within the perview of Acts, 1897-'8, p. 734. *Cosmp'n. Life Ins. Co. v. Koegel*, 619.

INTEREST.

1. *Claims Against U. S. Government.*—In no case is interest allowed on claims against the government of the United States, unless the government has stipulated to pay interest, or it is given by express statutory provision. *Trigg Co. v. Bucyrus Co.*, 79.

See BUILDING ASSOCIATIONS, 1, 2, 4; EQUITY, 5.

INTERSTATE COMMERCE. See CONSTITUTIONAL LAW, 4, 5; TELEGRAPH AND TELEPHONE COMPANIES.

INVENTORY. See INSURANCE, 11.

JEOFAILS. See PLEADING, 12.

JUDGMENTS.

1. *Duration of Lien.*—A judgment may be kept alive perpetually by the issue of successive executions within the statutory period. *Ackiss v. Satchell*, 700.
2. *Verdicts—Not Responsive to Issues—Outside of Issue—Case at Bar.*—Where issue is joined upon a plea of not guilty to a declaration alleging fraud and conspiracy upon the part of defendants, whereby plaintiff was deprived of a valuable equitable interest in a gold mine, and his business and trade as a miner in said mine had been broken up and destroyed

and upon such issue the jury find for the plaintiff and "assess his damages for loss of service at five hundred dollars, and allow nothing for loss of interest in the mine," no judgment can be entered in favor of the plaintiff, as the verdict does not respond in his favor to any allegation in his declaration. As to the interest in the mine it is in favor of defendants, as to the plaintiff's business and trade as a miner it is silent; and no issue was or could have been made as to the plaintiff's loss of services. *Murray v. Moore*, 707.

See LIMITATION OF ACTIONS, 3, 5.

JUDICIAL SALES.

1. *Purchaser—Notice of Contents of Record—Boundaries—Party Wall—Commissioner's Deed—Excess of Powers.*—A purchaser at a judicial sale is chargeable with notice of the contents of the record under which he purchases as to the title, boundaries, etc., of the property sold. If the decree directing the sale and that confirming it describes the property as beginning so many feet from a given street "at the center of the partition wall between it and the adjoining tenement on the east," and that is all the parties to the suit owned, but the commissioner, in making the deed to the purchaser, omits the words quoted, such omission cannot enlarge the rights of the purchaser, and he cannot claim the whole of the wall even though covered by the distance mentioned. He can get no more than the parties to the suit owned, and if the language of the commissioner's deed covers more, it is in excess of his powers., *Belletot v. Laube*, 842.

JURISDICTION. See APPEAL AND ERROR, 8.

JURORS. See CRIMINAL LAW, 13.

LACHES.

1. *Defeating a Right—Case in Judgment.*—Laches which will defeat a right must be such as to afford a reasonable presumption of satisfaction or abandonment of the claim, or such as to prevent a proper defense by reason of the death of parties, loss of evidence or otherwise. Whether the lapse of time is sufficient to bar a right must depend upon the particular circumstances of each case. In the case in judgment, the

parties in interest are still living, no evidence has been lost by death, no records have been destroyed nor papers lost, there is no uncertainty as to the amount due, no presumption of payment, and the claimant cannot be said to have been guilty of such laches as will bar his right to recover. *Selden v. Kennedy*, 826.

2. *Equity*—The personal representative of a surety cannot complain of laches on the part of the creditor, where the time has been spent in the prosecution of the debt against the estates of the principal, and of a co-surety for the relief of such surety. *Turk v. Ritchie*, 587.
3. *Obscurity of Transaction*.—The defense of laches cannot prevail where the transaction has in no wise become obscure by the lapse of time or the loss of evidence and the sum sought to be recovered is susceptible of exact ascertainment. *Davis v. Davis*, 65.

LIBEL AND SLANDER.

Identification of Plaintiff—Mistaken Identity.—The publishers of a newspaper are not liable in damages for publishing a libel of a plaintiff, where the publication was made without negligence on the part of the publishers, was not made of the plaintiff, but of another person and was not in its description or identification such as to lead those who knew or knew of the plaintiff to believe that the article was intended to refer to her. The fact that the name, occupation and career of the person actually referred to corresponds closely with that of the plaintiff will not render the publishers liable when there was no purpose to refer to the plaintiff, and the publication was not made recklessly but after due enquiry and a portion of the publication itself excludes the conclusion that it had any reference to the plaintiff. *Butler v. News Leader Co.*, 1.

LICENSE. See TAXATION, 3, 5.

LICENSES. See RAILROADS, 3, 14.

LIMITATION OF ACTIONS.

1. *Bonds—Code, Sec. 2938*.—Under the provisions of Sec. 2938 of the Code the limitation to an action on a bond dated and due

prior to May 1, 1888, and upon which no action was then pending, is twenty years from its maturity, notwithstanding the death of the obligor in 1889. *Davis v. Davis*, 65.

2. *Continuous Agency—Case in Judgment.*—As a general rule, when there is an undertaking or agency which requires a continuation of services, the statute of limitations does not begin to run until the termination of the undertaking or agency. The facts in this case do not take it from under the influence of the general rule. The agency was continuous for 17 years; the transactions were numerous, involving a long and complicated account, the details of which were known only to the agent, and the principal was a non-resident and compelled to rely upon the agent for a faithful discharge of his trust. *Wilson v. Miller*, 446.
3. *Death of Debtor Before Cause of Action Accrues—Judgment Against Executor—Enforcement of Judgment—Code, section 2920.*—The provision of section 2920 of the Code, declaring that a right of action which accrues to a creditor after the death of a debtor, shall not continue longer than five years after the same shall have accrued, does not bar the claim of a creditor who obtains judgment in 1895 against the executor of a debtor upon a bond upon which the right of action accrued in January, 1894, after the debtor's death, and who proves the judgment in 1899, in a suit brought to settle the debtor's estate. *Turk v. Ritchie*, 587.
4. *Exceptions Made by Courts.*—As a general rule, courts have no power to add to the exceptions contained in a statute of limitations. The fact that the Legislature has made some exceptions is an indication that no others should exist. The exceptions to the general rule are very limited in character, and are to be admitted with great caution. *Ackiss v. Satchell*, 700.
5. *Judgments—Claim of Homestead—Suspension of Act.*—The prohibition to the enforcement of a judgment against property set apart as a homestead does not suspend the running of the statute of limitations as to the judgment. After the lapse of twenty years from the return day of an execution upon which there is a return by an officer, without a *scire facias* or action brought thereon in the meantime, the judgment is barred by limitation, and the lien, which is a mere incident of the judgment, ceases, unless the case is within some exception provided by the statute. A claim of homestead by the judgment debtor is not one of the exceptions mentioned in

the statute, nor does the inability to enforce the judgment against the homestead prevent the suing out of an execution in order to keep the judgment alive. *Ackiss v. Satchell*, 700.

6. *Suspension—Conditional Payments—Collaterals.*—Whether a note of a third person given for pre-existing debt of the transferer is a discharge of the pre-existing debt, or a collateral security for it, or a conditional payment of it, is a question of intention of the parties. If given as a conditional payment it suspends all right of action on the original debt until the note so transferred has been dishonored by non-acceptance, or non-payment. The note taken in conditional payment becomes, by its dishonor a collateral security, which the creditor may retain and endeavor to collect, without forfeiting the right to proceed on the principal cause of action, subject to the obligation of surrendering up the note at the trial. *Davis v. Davis*, 65.

See EXECUTIONS; SUBROGATION.

MADISON HEIGHTS. See CONSTITUTIONAL LAW, 8.

MALICIOUS PROSECUTION.

1. *Suing Out an Attachment Before a Court Without Jurisdiction.*—

If an attachment be sued out maliciously and without any probable cause from a court without jurisdiction and damage results from the levy of said attachment, the defendant in the attachment may sue the plaintiff therein for the damage so occasioned. The malicious suing out and levy of the attachment is sufficient basis for the action. *Ailstock v. Moore Lime Co.*, 565.

2. *Termination of the Prosecution.*—In an action for malicious prosecution it is essential for the plaintiff, amongst other things, to allege and prove that the criminal prosecution which is the basis of the action has terminated in a manner not unfavorable to the now plaintiff. There need not have been a trial on the merits. It is sufficient that the prosecution has terminated in such manner that it cannot be reinstated nor further maintained without commencing a new proceeding. Only the particular prosecution need be ended. It is immaterial that a new one for the same alleged offence may be set on foot. *Ward v. Reasor*, 98 Va. 399, overruled. *Graves v. Scott*, 372.

MARRIED WOMEN.

1. *Married Woman's Act—Services of Wife—Personal Injury of Wife.*—Notwithstanding the comprehensive provisions of the present Married Woman's Act in this State (Acts, 1899-1900, p. 1240), the husband is still entitled to the services of his wife, and, in an action by her to recover damages for injury inflicted upon her, where the only testimony as to the diminution of her ability to perform her ordinary duties related to her impaired capacity for attending to her household duties, it is error to instruct the jury that, in assessing the damages, they may take into consideration the diminution, if any, of her physical ability to perform the ordinary duties of life, as the language of the instruction covers damages for which the husband alone can recover. *Norfolk Ry. and L. Co. v. Williar*, 679.
2. *Statutory Separate Estate—Contract to Sell.*—A contract by a married woman, in which her husband unites, for the sale of her statutory separate estate acquired under the act of April 4, 1877, may be enforced in equity either for or against her. *Dunn v. Stowers*, 290.
3. *Statutory Separate Estate—Contract to Sell—Code, Sec. 2502.*—Section 2502 of the Code relating to the effect to be given to certain conveyances made by married women and the covenants therein contained does not in any way prohibit her from contracting to sell her statutory separate estate, or inhibit or interfere with a court of equity in the enforcement of such contracts. *Dunn v. Stowers*, 290.

MASTER AND SERVANT.

1. *Assumed Risks—Negligence of Master.*—A servant, by implication assumes the ordinary risks incident to the service in which he engages, but not those risks which may be obviated by the master by the exercise of reasonable care on his part. A failure on the part of the master to observe, for the protection of his servant, that reasonable degree of care which the circumstances of the particular case justly demand is actionable negligence, and is not within the influence of the doctrine of assumed risks. *Black v. Va. P. Cement Co.*, 450.
2. *Complex Business—Publication of Rules—Warnings.*—Where two companies are engaged in operating steam engines and cars upon the same tracks in the same yard, running back-

wards and forwards, at all hours of the day and night, the business is of such complex nature that they should promulgate rules for the protection of their employees in the discharge of their duties, and the failure to do so is such negligence as to render them responsible for the injuries resulting therefrom. *Va. Iron, &c. Co. v. Lore*, 217.

3. *Contributory Negligence—Conflicting Evidence—Demurrer to Evidence—Case at Bar.*—The evidence as to whether the plaintiff's intestate was guilty of contributory negligence was conflicting, and, therefore, upon the defendant's demurrer to the evidence, that question should have been decided in favor of the plaintiff. The evidence strongly tended to show that the plaintiff's intestate was not guilty of negligence in remaining at his post of duty while many others, who had no duty imposed upon them, remained at the same place. *Fisher v. Ches. & O. R. Co.* 635.
4. *Dangerous Place—Warning—Evidence of Lack of Warning.*—As it is not the duty of the master to warn his infant employees of dangers at any particular time and place, the fact that certain witnesses did not hear such warnings given, although they were in a position where they would have been likely to have heard them, if given, does not tend to prove with any degree of probability that no such warnings were given, and such evidence should not be received. *Va. Iron, &c. Co. v. Tomlinson*, 249.
5. *Dangerous Place—Warning—Other Dangerous Places.*—The negligence of a master in not warning an infant employee of dangers at his place of work cannot be established by evidence that other infants were permitted, with his knowledge and without objection on his part, to go in or near other dangerous places on the premises. *Va. Iron, &c. Co. v. Tomlinson*, 249.
6. *Duty of Master—Ordinary Care—Infant Servant.*—Ordinary care, under all the facts and circumstances of the case is the measure of a master's duty to his servants in the case of infants as well as in the case of adults, though what is ordinary care will vary under different circumstances, one of which is the infancy of the servant. *Va. Iron, &c. Co. v. Tomlinson*, 249.
7. *Infant Servant—Negligence of Father.*—The fact that a father permits his infant son to accept employment in a dangerous business will not defeat his right of recovery against the master for the death of the son occasioned by the negligence of the master, or his servants. *Va. Iron, &c. Co. v. Tomlinson*, 249.

8. *Negligence—Safe Place—Case at Bar.*—Upon the merits of the case, independently of the defense of the statute of limitations, which was withdrawn, it is held that the plaintiff in error was guilty of actionable negligence in failing to use ordinary care to keep its rock quarry in which the defendant in error was employed as a laborer, in a reasonably safe condition, which negligence was the proximate and efficient cause of the injury complained of; and that this unsafe condition was not attributable to the work which was being done in the quarry, nor was the charge of contributory negligence on the part of the defendant in error sustained by the evidence. *Norfolk & W. R. Co. v. Coffey*, 665.
9. *Railroads—Delivery of Defective Cars—Inspection—Injury to Servant of Receiving Company.*—If a railway company delivers, on a siding, to a company operating an iron furnace, cars without brakes, or with unsound brakes, in consequence of which defect a servant of the receiving company is injured, his remedy is against the receiving company only, whose servant he is, and whose duty it was to inspect the cars before use, and either decline to receive them or else remedy the defect. There is no relation of employer and employee between the delivering company and the person injured. *Risque v. Ches. & O. R. Co.*, 476.
10. *Railroads—Safe Place—Cuts—Overhanging Materials—Track Walker.*—It is the duty of the master to use ordinary care to provide for the servants a reasonably safe place in which to work. In the case of railroads this duty involves not only the proper construction, but also the proper maintenance and inspection of the roadbed and track. Cuts are as much a part of the track as fills and bridges, and it is the duty of the railroad company to use due care to prevent the obstruction of its track by landslides, or the casting thereon of other debris created by the common processes of nature. The fact that the company keeps a track walker to examine cuts and warn approaching trains of dangers does not excuse it from the duty it owes of removing earth, stone, or other material in dangerous proximity to the cut, and which is in a condition to slide or fall upon the track. *Fisher v. Ches. & O. R. Co.*, 635.
11. *Safe Appliances—Reasonably Safe, not Safest.*—While a master ought to keep reasonably abreast with improvements in machinery for the protection of his servant, he is not bound to furnish the safest instrumentalities, but only such as are

reasonably safe. The test is not whether the instrumentality selected is the best to be had, but is it reasonably adequate and proper for the use to which it is to be applied. *Norfolk & W. R. Co. v. Bell*, 836.

12. *Safe Appliances—Comparative Safety—Appliances used by Other Masters.*—While a witness, with adequate knowledge, may testify as to the general practice of masters, and the comparative safety of different appliances, it is not competent for him to show that the different methods or appliances of another master are better than those of the defendant. On this subject even the skillful and the experienced may differ, and negligence cannot be established by such comparison. *Norfolk & W. R. Co. v. Bell*, 836.
13. *Safe Place—Fireman Running Engine—Servant out of Place.*—Where, under the rules of a railroad company, a fireman is permitted to run an engine in the presence of the engineer, and thereby learn to become an engineer, the company owes him the duty, while running the engine, of using ordinary care to provide and maintain a reasonably safe place in which he is to do the work, including reasonably safe machinery and appliances considering the character of the work to be done, and the difficulties and dangers attending it. A fireman, standing on the side of the engineer, and running an engine under such circumstances, while an apprentice employed by the company is doing the firing, cannot be said to be in a place where he had no right to be. *Norfolk & W. R. Co. v. Bell*, 836.
14. *Safe Instrumentality—Primary Use—Secondary Use.*—Although an appliance may be primarily intended for one purpose, if it is convenient and safe to use it for a secondary purpose, and it is so used by a servant with the knowledge of the master, and without objection on his part, he is chargeable with the duty of using ordinary care to see that such appliance is in a reasonably safe condition for such secondary use. *Wood v. Southern R. Co.*, 650.
15. *Safe Place—Special Damages—Fire in Adjoining Mine.*—It is the duty of a mining company to give notice to a miner who is ignorant of the fact of the existence of a fire in an adjoining mine, on a lower level, and connected by cross-cuts with the mine in which he is about to enter, and of which the company has notice. In the case at bar the company knew, or, in the exercise of ordinary care, ought to have known of the dangerous consequences likely to result from such a fire; and if it failed to give such notice it is liable for resulting in-

juries to the miner. It is the duty of the master to give warning to his servants of all perils to which they will be exposed of which he is, or ought to be, aware, other than such as they should, in the exercise of ordinary care, have foreseen, as necessarily incident to the business, in the natural and ordinary course of affairs. *Pocahontas Collieries Co. v. Rukas*, 278.

16. *Safe Place—Warning—Change of Rules During Servant's Absence.*—If a former servant returns to the employment of the master, and during his absence rules which formerly existed for the protection of servants have been abrogated, it is the duty of the master to publish new rules, or else to warn the servant of the dangers to which he will be subjected. *Va. Iron, &c. Co. v. Lore*, 217.
17. *Two Modes of Doing Work—One Safe, Another Dangerous.*—Where an employee is confronted with two methods of doing work, the one safe and the other dangerous, he owes a positive duty to his employer to pursue the safe method, irrespective of the degree of danger involved in the unsafe method, and any departure from the path of safety will prevent his recovery, if injured. *Wise Ter. Co. v. McCormick*, 400.
18. *Obvious or Known Dangers—Unnecessary Exposure.*—An employee unnecessarily undertaking work in such a position that its performance is obviously dangerous, or known by him to be dangerous, when it could have been otherwise performed without danger, in a way well known to the employee, cannot recover of his employer for injuries occasioned thereby. *Newport News P. Co. v. Beaumeister*, 744.
19. *Probable and Possible Dangers—Case at Bar.*—A master is not an insurer of the safety of his servant. While it is his duty to anticipate and guard against consequences that may be reasonably expected to occur, he is not required to foresee and provide against that which reasonable and prudent men would not expect to happen. In the case at bar, while it was negligence on the part of the defendant to fail to restore an electric light in the pit under its printing press for the use of the plaintiff, its servant, yet the proximate cause of the plaintiff's injury was his own palpable negligence, and there can be no recovery. *Newport News P. Co. v. Beaumeister*, 744.
20. *Safe Place—Supervision by Servant—Instructions—Partial View of Case—Case at Bar.*—The rule that it is the duty of the master to exercise ordinary care to provide the servant with a reasonably safe place in which to work, and to keep it so, does not apply where the injured servant is himself to per-

form the duty of keeping the place in such condition. In the case at bar the instruction given states the general rule, but makes no reference to the duty devolved upon the servant as disclosed by the evidence in the cause, nor to the evidence tending to show his contributory negligence, and hence was misleading and erroneous. *Newport News P. Co. v. Beaumeister*, 744.

See DEMURRER TO EVIDENCE, 2, 4; NEGLIGENCE, 3; PLEADING 6; RAILROADS, 12.

MINES AND MINING.

1. *Cost of Mining—Reasonable Cost—Comparison With Other Mines.*

In order to determine whether ore can be mined at a reasonable cost, it is not sufficient to show the cost at other mines in operation. To make such a comparison proper, the conditions at the several mines compared should be the same. *Big Stone Gap Iron Co. v. Olinger*, 261.

2. *Evidence—Burden of Proof—Mining Lease—Conditional Contract.*

If a contract to mine so much ore per month and pay an agreed royalty per ton, provided there is that much merchantable ore upon the land capable of being mined at a reasonable cost, be abandoned by the lessee, the burden of proof is on him to show that the land did not contain ore of the requisite quantity and quality. *Big Stone Gap Iron Co. v. Olinger*, 261.

3. *Evidence—Merchantable Commodity—How Ascertained.*

Whether or not a commodity, such as iron ore, is merchantable is not to be determined solely from the expert evidence introduced on that subject, but from all the evidence which the court has admitted on that subject. *Big Stone Gap Iron Co. v. Olinger*, 261.

See MASTER AND SERVANT, 15.

MISTAKE. See EVIDENCE, 9, 10; REFORMATION 1.

MORTGAGES.

Railroad Mortgages—Suits Affecting—Parties.—Railroad mortgages are a peculiar class of securities in which the trustee, expressly or impliedly, represents the bondholders, and it is his duty to enforce their rights and to protect their interests

under the trust. He is the proper party to bring a suit for the foreclosure of such mortgage deed, or to protect or to recover the mortgage property, and a bondholder cannot bring such suit unless the trustee has been requested to do so, and has refused or neglected so to do within a reasonable time, or is in a position where he is unable to act. *Va. Pass. & P. Co. v. Fisher*, 121.

See APPEAL AND ERROR, 6.

MUNICIPAL CORPORATIONS.

1. *Dissolution—Invalid Incorporation.*—While a court of equity cannot dissolve a municipal corporation which once had a legal existence, it may declare unconstitutional an act of Assembly which seeks to bring it into existence, in a proper proceeding which involves the validity of said act. *Campbell v. Bryant*, 509.
2. *Ultra Vires Acts—Operating Stone Quarry.*—In the absence of express authority, by charter or other positive enactment, a municipal corporation has no power to operate a stone quarry outside of its corporate limits, and is not liable for an injury negligently inflicted on an employee while it is operating such quarry. It is immaterial that the stone is to be used for the repair of streets which it is required to keep in order. The one power is not incidental to the other, and the operation of the quarry is an *ultra vires* act, and the municipality is not liable for its negligent performance. *Donable v. Harrisonburg*, 533.

See CONSTITUTIONAL LAW, 2, 7, 8, 9, 13; PARTIES 1; TAXATION. 2.

NEGLIGENCE.

1. *Action for Negligence.*—An action for negligence only lies where there has been a failure to perform some legal duty which the defendant owes to the party injured. *Williamson v. Southern R. Co.*, 146.
2. *Case at Bar—Contributory Negligence.*—The evidence in this case wholly fails to show actionable negligence on the part of the defendant, and hence the plaintiff was not entitled to recover. The plaintiff, an employee of the defendant, while off duty, at an unexpected time and place, stepped into the middle of the defendant's railroad track in front of a slowly moving

engine and tender, which were backing, and attempted to get on the step or foot-board on the rear of the tender, upon which was placed an oil can, and fell under the tender and was injured. The engine and tender were properly equipped and managed for the work required, and the engineer used due diligence to stop the train as soon as the plaintiff's peril was discovered. It was not reasonably necessary or proper for the plaintiff to take the risk he took in order to accomplish the purpose he had in mind in attempting to board the tender. *Wise Ter. Co. v. McCormick*, 400.

3. *Case at Bar—Demurrer to Evidence.*—Upon the evidence in this case, the jury might have found that the plaintiff's intestate had the right to use a certain instrumentality, that he was using it in the performance of his duties at the time the injury complained of was inflicted, that it was in a defective condition, that the defendant was chargeable with knowledge of the defect and with negligence in not repairing it, and that the plaintiff was not chargeable with contributory negligence; and as the jury might have so found it was the duty of the court so to decide upon a demurrer to the evidence by the defendant. *Wood v. Southern R. Co.* 650.

4. *Case at Bar—Leaving Switch Open—Demurrer to Evidence.*—Whether or not leaving a switch open in the yard of a furnace company by those in charge of the yard engine until the return of the engine from its trip, in accordance with a custom of doing business, was, in the absence of any rule on the subject, negligence on the part of those in charge of the engine, was, under all the facts and circumstances of the case, a question for the jury, and as they might have found that it was not, it was the duty of the trial court, on a demurrer to the evidence, to so find. *Va. Iron, &c. Co. v. Lore*, 217.

5. *Concurring Negligence of Plaintiff.*—If malaria, which is the foundation of an action, may have been caused as well by the condition of plaintiff's premises as by stagnant water on the premises of the defendant, it is error to instruct the jury to find for the plaintiff if they believe that the "stagnant water was the principal and substantive cause of the injury complained of, even though other causes may have contributed to a lesser extent." The law will not undertake to balance the negligence of the respective parties to ascertain which was most in fault. The plaintiff must prove by a preponderance of evidence that the injury complained of

was occasioned by the fault or negligence of the defendant before the latter can be held liable therefor. *Ches. & O. R. Co. v. Whitlow*, 90.

6. *Concurrence of Wrong and Damage—Injury*.—Injury alone is not sufficient to support an action for damages arising from the alleged negligence of the defendant. There must be a concurrence of wrong and injury. If a person does an act which is not unlawful in itself he cannot be made liable in damages for the resulting injury unless he does the act at a time or in a manner, or under circumstances which will render him chargeable with a want of proper regard for the rights of others. *Norfolk & W. R. Co. v. Gee*, 806.
7. *Contributory Negligence—Case at Bar*.—Upon the evidence in this case, if the negligence of the defendant's servant be conceded, it clearly appears that the plaintiff's right of recovery is barred by his concurring negligence at the time the injury complained of was inflicted. *Wise Ter. Co. v. McCormick*, 400.
8. *Driving on City Street—Lookout—Negligence Per Se*.—In an action to recover damages for an injury inflicted on a young child by driving a wagon over it in the street, it is error to instruct the jury that if they believe from the evidence that at the time the child was struck and run over by the defendant's wagon the driver was looking at a punching bag on the side of the street and therefore did not see the child, then they must find for the plaintiff (child), as it takes away from the jury the consideration of other circumstances in the case, and tells them that the facts stated constitute such negligence as entitles the plaintiff to a verdict. *Amer. Tob. Co. v. Polisco*, 777.
9. *Driving on City Street—Lookout—Question for Jury*.—A driver of a vehicle on the streets of a city may reasonably expect to meet people, young and old, in the street or crossing the street, and it is his duty to keep a lookout for them in order to avoid injuring them. Whether or not an injury to a person on the street by colliding with such vehicle was proximately caused by the negligence of the driver in failing to keep a proper lookout is a question for the jury under proper instructions from the court. *Amer. Tob. Co. v. Polisco*, 777.
10. *Negligence Producing Emergency*.—One who, by his own negligence, has placed another in an emergency, cannot require of that other the wisest possible action in order to save him from the consequences of his own fault. *Wise Ter. Co. v. McCormick*, 400.

11. *Ordinary Care—When Question for Jury—Demurrer to Evidence—Case at Bar.*—What is ordinary care depends on the facts and circumstances of the particular case. If, upon the facts, reasonable men may fairly arrive at different conclusions, then the question of negligence is one for the jury, and, if the case be heard upon a demurrer to evidence by the defendant, judgment should be entered for the plaintiff. In the case at bar, the evidence was conflicting as to whether the defendant was negligent in failing to remove stone which rolled down upon the track and caused the injury complained of, and hence on its demurrer to the evidence, judgment should have been given for the plaintiff. *Fisher v. Ches. & O. R. Co.*, 635.
12. *Proximate Cause—Natural and Probable Result.*—The law always refers an injury to the proximate, not to the remote cause. To warrant the finding that an act of mere negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, and that it ought to have been foreseen in the light of the attending circumstances. *Winfree v. Jones*, 39.
13. *When Not Imputed.*—Negligence cannot be imputed to one unless he has done something which he knew or had reason to believe might cause injury to another. *Wise Ter. Co. v. McCormick*, 400.

See CARRIERS, 3; DAMAGES, 1; DEATH BY WRONGFUL ACT, 2; DEMURRER TO EVIDENCE, 4, 16; INFANTS, 1, 2; MASTER AND SERVANT, 1, 3, 4, 8, 10; PLEADING, 5, 6, 7; RAILROADS, 4, 5, 6, 9, 10, 11, 12, 13; VERDICTS, 1.

NEGOTIABLE INSTRUMENTS.

1. *Blank as to Amount—Amount in Margin—Use of Margin.*—The amount for which a negotiable note is made out must be clearly expressed in the note, and if the blank for the amount in the body of a note be left unfilled, its place cannot be supplied from the margin whether written out in full or expressed in figures. The margin may be used to remove an ambiguity in the body of the note, or to clear up a doubt, but not to supply a blank. *Chestnut v. Chestnut*, 539.
2. *Blank as to Amount—How Filled—Incompleteness.*—Where a blank in the body of a negotiable note for the amount thereof is left unfilled, the instrument is incomplete, and there can be no recovery on it; but it is not invalid simply be-

cause incomplete. It creates certain rights and obligations, and, when properly filled up by a *bona fide* holder, may be enforced at law, or, if left blank by mistake, the mistake may be corrected in equity. *Chestnut v. Chestnut*, 539.

3. *Blank as to Amount—Use in Evidence—How Blank Filled.*—Where the amount of a negotiable note is expressed in the margin but not in the body of the note, the note cannot be used in evidence to support an averment in the declaration of the making of a note for the sum stated in the margin, but the delivery of such a note is generally authority to a *bona fide* holder to fill the blank for the true amount due not exceeding the amount stated in the margin, and if the plaintiff, who is the payee of the note, has not lost the right by unreasonable delay or otherwise, he may, in the absence of evidence that the blank was left by mistake, fill the blank in the body of the note with the amount agreed on with the maker, and so make the note conform to the averments of his declaration. *Chestnut v. Chestnut*, 539.

NEW TRIAL.

1. *After-discovered Evidence.*—If, pending the trial of a case and before it is submitted to the jury, it is discovered for the first time that the evidence of a particular witness is material, it is the duty of the party wishing his evidence to ask the court for such delay as is necessary to procure the testimony of the witness, and it is the duty of the court to grant the request if the circumstances are such as would entitle the party, after judgment, to ask for a new trial on the ground of the absence of such witness. It is not good cause for a new trial on the ground of after-discovered evidence, in the absence of such a request. *Wright v. Agelasto*, 159.
2. *Exclusion of Evidence—When Harmless.*—The judgment of a trial court will not be reversed for refusing to permit a witness to answer a question where it is clear that the witness did not have the requisite knowledge of the subject about which he was being interrogated, and the interrogator was not prejudiced by the action of the trial court. *Stokes v. Southern R. Co.*, 817.
3. *Impeachment of Witnesses.*—As a general rule, subject to rare exceptions, a new trial will not be granted where the sole object is to discredit an adverse witness. *Norfolk & W. R. Co. v. Spencer*, 657.

See APPEAL AND ERROR, 4, 5; CRIMINAL LAW, 8, 14, 15, 16, 17.

PARENT AND CHILD.

1. *Gifts—Presumption.*—If a father is indebted to his son and places money to the credit of the latter in bank, the presumption is that this was intended as a payment on account, and to overcome this presumption the evidence must be clear and convincing. *Watts v. Watts*, 269.
2. *Step-children—Support.*—A step-mother who is chargeable as guardian *de facto* of her infant step-son, whose father is insolvent, should be allowed credit for the support and maintenance of said step-son and the keep of his horse, where the support of the family has devolved upon her. *Watts v. Watts*, 269.
3. *Support—Application of Infant's Estate.*—It is the common law duty of a father to support his child, if of ability to do so. Where the child has property of its own, the court, in the application of this rule, looks at the circumstances of the particular case, and determines according to the right and justice thereof, having in view the position and wealth of the parties. *Watts v. Watts*, 269.

PARTIES.

1. *Equity—Injunction—Unauthorized Tax—Parties.*—Where the mayor and council of a town imposing an unauthorized tax are parties in their official capacity to a bill to enjoin the collection of the tax, it is not necessary to make the town a party by name. *Campbell v. Bryant*, 509.
2. *Equity—Parties—Agents or Servants.*—Where a mother controls and manages a farm, and takes all the rents and profits arising therefrom, her sons who simply assist her in running the farm are not proper parties to a suit against the mother to have an account of such rents and profits. *Watts v. Watts*, 269.

See CONTRIBUTION; EQUITY, 13, 14; PARTITION.

PARTITION.

Equity—Partition—Creditor's Bill—Parties—Adverse Claimant—Cloud on Title.—Upon a bill filed for partition and for other purposes, where the decrees and proceedings in the case have made it in effect a creditor's bill for the satisfaction of liens due by the joint owners, and binding upon the estate to be partitioned, it is error to dismiss the bill as to a defendant

asserting an adverse claim to the land, or a part thereof, which is to be sold to satisfy such liens. In such case all clouds upon the title should be removed, and the amounts and respective priorities of the liens thereon should be fixed and ascertained before any decree of sale is made. *Moon v. Highland Dev. Co.*, 551.

PARTNERSHIP.

1. *Accounting—Private Expense of One Partner.*—A partner who conducts a private and competing business of his own through the general offices of the firm, is rightly accountable for an equitable proportion of the expenses of such offices. He cannot, as settling partner of the dissolved firm, charge the whole of such expenses to the firm. *Dixon v. Paddock*, 387.
2. *Dissolution—Accounting—Case in Judgment.*—A partner who has purchased an engine and rented it to the firm at a fixed rent per month cannot, upon dissolution, charge the engine to the firm at an advance price over costs. Upon the evidence in this cause, the engine should be charged to the firm at cost, and the partner who received the rent should be made to account to his co-partner for one-half thereof. *Dixon v. Paddock*, 387.
3. *Dissolution—Settling Partner—Fiduciary Relation—Fraud.*—The active partner in winding up and settling the affairs of a dissolved firm who, for liberal compensation, has assumed the duty of realizing the best price obtainable for firm property occupies such a relation of trust and confidence toward his confiding partner that he must show beyond all reasonable doubt the fairness and honesty of his transactions with such partner relative to the firm assets. He cannot buy from his confiding partner at a reduced price his interest in firm property, upon which he has given an option, or which he has sold or contracted to sell to another at a much larger sum, without first making to him a full disclosure of the facts. Nor are the rights of the parties in any way affected by the fact that he agreed with the proposed purchaser to observe secrecy as to the contract. *Dixon v. Paddock*, 387.
4. *Dissolution—Use of Partner's Name in New Business—Unfair Competition.*—Upon dissolution of a partnership a partner has the right to use his own name (which had been previously used in the firm business) in connection with his own business, and an intention to divest himself of this

right will not be readily presumed, but must be clearly shown, and this rule is not altered by the addition of a word to indicate the nature of the business, or the addition of the word "company" to indicate that there was more than one in the concern, although, with the additions, the name of the new concern is the same as the old, unless the public is thereby misled, or the rights of others encroached upon. The evidence in the case in judgment does not make out a case of unfair competition. *Blanchard v. Simon*, 209.

PARTY WALLS.

1. *Party Walls—Case in Judgment—Intention of Parties.*—Where the owner of a lot upon which there is a double tenement separated by a dividing wall, each building being exactly like the other, conveys said lots to two different grantees on the same day, and describes each lot as bounded by the other, and also gives the distance of the beginning point of each from a street nearby, but says nothing about the wall being a party wall, but the parties so regard the wall for a number of years, and so describe it in numerous conveyances of the lot, and it is manifest from the description given in the conveyances from the original grantor that such was the intention of the grantor and the respective grantees, and such construction is necessary to effectuate the rights of said parties, such wall will be held and considered as a party wall. *Bellenot v. Laube*, 842.
2. *Party Walls—What Constitutes—Rights of Parties—Dividing Walls—Presumption.*—A party wall is a dividing wall between two houses to be used equally, for all the purposes of an exterior wall, by the respective owners of both houses. It is a substitute for a separate wall for each adjacent owner, and one owner may carry it up to a necessary height for his purposes and the adjacent owner cannot compel him to remove it. In the absence of evidence to the contrary, every wall of separation between two buildings is presumed to be a party wall. *Bellenot v. Laube*, 842.
3. *Party Walls—Rebuilding—Strengthening.*—If a party wall be in a state of ruin, and the necessity for rebuilding be established by men skilled in the business, after due notice, one party may compel the other to contribute to the expense of rebuilding it, but if one party only wishes to make the wall wider or higher for his own benefit, he must do so at his own expense, without extending the wall further upon the

land of the other party, and without diminishing his rights in the party wall when reconstructed. *Beilenot v. Laube*, 842.

See JUDICIAL SALES, 1.

PAYMENT.

Presumption of Payment—How Repelled—Irregular Legal Proceedings.—The presumption of payment arising from the lapse of time is a mere presumption of fact which may be repelled by proof of any facts and circumstances which reasonably tend to establish the improbability of payment. The record of an action at law and an ancillary attachment founded on a debt in which a personal judgment was taken against the defendant, without service of process, is legitimate evidence to repel the presumption of payment arising from mere lapse of time, although the personal judgment is a void judgment. Such evidence tends to show that the plaintiff had not abandoned his claim but had actively, though unsuccessfully, endeavored to collect it through the medium of the courts. The plaintiff should not be restricted to showing merely the issuing and levy of an execution on such judgment, but should be allowed to introduce the entire record. *Allison v. Wood*, 765.

See PARENT AND CHILD, 1, 3.

PERSONAL INJURY. See EVIDENCE, 21.

PLEADING.

1. *Answering Adverse Allegations—Case at Bar.*—A plea which professes to answer the whole of what is adversely alleged in the declaration, but fails to do so, is bad and should be rejected. In the case at bar the declaration alleges that the defendants, their successors or assigns, did build and operate the railroad in the declaration mentioned, but the plea denied that the defendants built and operated the road and did not deny that it was built and operated by their successors or assigns. *Merriman v. Cover*, 428.
2. *Bill of Particulars—Declaration.*—A bill of particulars is no part of the declaration and statements contained therein cannot be read into the declaration. *Ches. & O. R. Co. v. Stock*, 97.

3. *Bill of Particulars—Insufficiency—Harmless Error.*—The ruling of a trial court on the sufficiency of a bill of particulars filed by the plaintiff will not be reversed where it is evident that the defendant was not embarrassed or hindered in any degree in making his defense. *Ches. & O. R. Co. v. Stock*, 97.
4. *Contracts Prima Facie in Restraint of Trade—Facts and Circumstances.*—In an action on a contract in restraint of trade, if the contract on its face is *prima facie* an unreasonable restraint on trade, the facts and circumstances showing the restraint to be reasonable may be averred in the declaration and proved on the trial, provided they do not vary, alter or contradict the terms of the contract. *Merriman v. Cover*, 428.
5. *Declaration—Allegation of Negligence.*—In an action for a personal injury inflicted by a railroad company at a public crossing, a declaration is bad which does not charge either that the company was guilty of negligence in the management of its trains as it approached the crossing which misled the plaintiff or put him in peril; or that, after the defendant knew, or by exercise of ordinary care could have known, of his peril, it could have avoided the injury; or a state of facts which showed that the defendant was guilty of negligence. *Seaboard R. Co. v. Vaughan*, 113.
6. *Declaration—Case at Bar—Personal Injury—Safe Place—Defences.*—A declaration which states that the plaintiff was in the employment of the defendant, who was engaged in quarrying rock, that the defendant, whose duty it was to keep its quarry in a reasonably safe condition, knowingly permitted a stone to remain in a position from which it was liable to fall at any time, and that it did fall, on a day stated, upon the plaintiff, who was ignorant of the danger, and in the exercise of due and proper care, and caution, by reason of which the injury complained of was inflicted, is good on demurrer. If the defendant relies upon the fact that the place was one in which the conditions were constantly changing, and that the preparation of it was a part of the work of the plaintiff, or that the danger was open and obvious, these are matters of defence to be established by proof. *Black v. Va. P. Cement Co.*, 450.
7. *Declarations—Numerous Counts—Bill of Particulars.*—A plaintiff may, in different counts of his declaration, allege any number of distinct acts of negligence on the part of a defendant, and the defendant may guard against surprise by calling for a bill of particulars, under Sec. 3249 of the Code, which will be granted in a proper case. *Pocahontas Collieries Co. v. Rukas*, 278.

8. *Declaration—What Sufficient.*—A declaration is sufficient which contains sufficient matter to enable the plaintiff to prove his case and so apprises the defendant of that case as to enable him to make defense. *Cosmop'n Life Ins. Co. v. Koegel*, 619.
9. *Failure to Reply—Rule—Non-suit.*—If a plaintiff fails to reply to a plea within the time prescribed by law, or order of court, the defendant should apply for a rule to compel him to do so, or in default thereof to suffer a non-suit. *Norfolk & W. R. Co. v. Coffey*, 665.
10. *Filing Pleas in Vacation—Notice to Counsel—Irregularities.*—After a case has been matured at rules and docketed, the court may permit additional pleas to be filed in term, but there is no statutory authority for permitting such pleadings to be filed in vacation. Such permission, however, is frequently granted by the trial courts and the practice is unobjectionable under proper limitations. Opposing counsel should always be given notice of the application to file such pleas and an opportunity to resist it, or else to procure supplemental leave to file other pleadings and make up the issue. At the succeeding term the court may correct any irregularities which have occurred. *Norfolk & W. R. Co. v. Coffey*, 665.
11. *Grounds of Defense—Insufficient Statement.*—If a defendant's grounds of defense, when called for, are not sufficient, the court should require a further and sufficient statement to be filed, and if not furnished to exclude evidence of any matter not described in the grounds of defense, or plea, so plainly as to give the plaintiff notice of its character. Code, sec. 3249. *Chestnut v. Chestnut*, 539.
12. *Jeofails—Want of Issue Not Cured.*—In an action at law, the statute of jeofails does not cure the *non-joinder*, or *want of issue* altogether, and no verdict or judgment can properly be rendered therein. *Norfolk & W. R. Co. v. Coffey*, 665.
13. *Judgment Non Obstante—Payment of Less Sum Than Due.*—Where the sole issue in a case is made by a general replication to a plea of accord and satisfaction setting up the discharge of a bond by the execution and delivery of two notes for the amount of the principal of the bond, and no other consideration, and there is a verdict for the defendant, in those jurisdictions where the common law prevails, judgment should be entered for the plaintiff *non obstante veredicto*. *Frank v. Gump*, 306.
14. *Misjoinder of Counts.*—A declaration containing counts in tort and on contract is bad on demurrer. *Murray v. Moore*, 707.

15. *Proof of Handwriting—Affidavit.*—Where the declaration alleges that the defendant made the note sued on, the defendant cannot deny the execution of the note unless his plea is accompanied by an affidavit putting that fact in issue. Code, sec. 3279. *Chestnut v. Chestnut*, 539.
16. *Declaration—Sufficiency.*—If a declaration, when read as a whole, charges the defendant with a breach of duty to the plaintiff, and states the facts constituting the alleged cause of action with sufficient certainty to be understood by the defendant, the jury and the court, it is good. It is not necessary for a plaintiff to negative his own contributory negligence or defenses which may be set up by the defendant. *Newport News P. Co. v. Beaumeister*, 744.

See APPEAL AND ERROR, 9; ASSUMPSIT, 1; CARRIERS, 6; CORPORATIONS, 7; DEMURRER TO EVIDENCE, 3; INFANTS, 3; INSURANCE, 4, 26, 27, 29; JUDGMENTS, 2; NEGLIGENCE, 1; RAILROADS, 6, 19.

POLICE OFFICERS. See CONSTITUTIONAL LAW, 13.

PRINCIPAL AND AGENT.

Common Agent of Two Principals—Imputed Knowledge—Burden of Proof.—Where a waiver is sought to be established in consequence of the imputed knowledge of an agent, and the same person is agent for two principals, knowledge acquired by him while acting as the agent of one, in order to be binding on the other, must have been present in the agent's mind at the time he did the act which it is claimed constituted a waiver by such other, and the burden is on the party relying upon the waiver to prove this. The proof, however, may consist of circumstances as well as direct evidence. *Foreman v. German Ins. Ass'n.*, 694.

See LIMITATION OF ACTIONS, 2.

PROCESS. See INFANTS, 4.

PROXIMATE CAUSE. See NEGLIGENCE, 12.

PUBLIC USE. See EMINENT DOMAIN, 2; WATERS AND WATERCOURSES, 3.

QUIETING TITLE.

Bill to Remove Cloud.—A person in possession of land, with a fee simple title, may file a bill to remove a cloud from the title. *Beach v. Bellwood*, 170.

QUO WARRANTO.

Railroads—Forfeiture of Charter—Who may be Relator.—A writ of *quo warranto* does not lie at the relation of a private person to determine whether or not a railroad company has forfeited its charter for failure to construct a certain part of its road within the time prescribed by its charter. The State alone can institute such a proceeding. While the language of the statutes applicable to *quo warranto* is broad enough to cover such a case, the case is otherwise specially provided for by Code (1904), Sec. 1313a, Cl. 58, which is to be treated as an exception to the general provisions. *South. & W. R. Co. v. Commonwealth*, 314.

RAILROADS.

1. *Common Carriers—Express Messenger—Release.*—An express messenger who is injured through the negligence of a railroad company, over whose road he is being hauled, may recover from the railroad company, notwithstanding he has contracted in advance with the express company to release it and the railroad company from all liability for such injury. The contract is contrary to public policy, and void both at common law and by statute. Code (1904), Sec. 1294c (25). *Shannon v. Ches. & O. R. Co.*, 645.
2. *Communicated Fires—Burden of Proof.*—If the engines of a railroad company are equipped with the best spark arresters in known practical use, and they are in good order, and the engines are operated by competent and experienced servants, the company is not liable in damages for fires set by sparks from its engines at places off its right of way. If, under these conditions, it is sought to charge the company with liability for a fire communicated from its right of way, which was foul—this constituting negligence on its part—the burden is on the plaintiff to show affirmatively that the fire originated on the company's right of way. It is not sufficient to show a probability of that fact. Unless that fact

is established there is no proof of negligence on the part of the company, and hence there can be no recovery against it. There is no presumption as to where such a fire starts. *Atlantic, &c. R. Co. v. Watkins*, 154.

3. *Duty to Licensees*.—A railroad company owes no duty of previous preparation for the protection of mere licensees. Its sole duty is to use reasonable care to discover and not to injure such persons when they may reasonably be expected to be on its tracks at a particular point. The obligation is not an absolute one, but it is only to use ordinary care for their protection, under conditions and circumstances as they actually exist at the time and place where the licensee may be reasonably expected. *Williamson v. Southern R. Co.*, 146.
4. *Lookout—Fireman "Hooking" Fire*.—The fact that a fireman, in the regular discharge of his duties, is engaged in "hooking" his fire while the engine is in motion on one of its trips is not an act of negligence. *Brammer v. Norfolk & W. R. Co.*, 50.
5. *Crossing—Negligence—Case at Bar*.—The evidence in this cause shows that the plaintiff's intestate was guilty of negligence, but fails to disclose negligence on the part of the defendant company. The train which inflicted the injury complained of was backing slowly, its bell was ringing, and it was in full view of plaintiff's intestate who approached it riding a bicycle rapidly, and turned down the track in a safe place, and whose peril was not apparent to the company's servants until he fell or was thrown from his bicycle on the track immediately in front of the moving train, when the collision could not be avoided. *Seaboard R. Co. v. Vaughan*, 113.
6. *Frightening Horses—How Charged in Declaration—Nature of Object—Railroads*.—In an action against a railroad company for negligently frightening plaintiff's horse at a public crossing, it is not sufficient to charge that the defendant negligently placed a hand-car with long projecting arms at or so near the crossing as to render it unsafe for the traveling public in vehicles drawn by horses to cross on the highway, and that, in consequence thereof, the plaintiff's horse took fright and caused the injury declared on in the declaration. Nor is a count good which makes similar charges and adds that defendant's servant negligently hung wearing apparel and bright tin buckets on the arms of the handcar, and that these objects caused plaintiff's horse to take fright. In each instance it was necessary to aver that the hand-car was, under the circumstances stated, an object of such unusual or

extraordinary appearance as to have a natural tendency to frighten horses of ordinary gentleness and training, although that was a question to be determined by the jury from all the circumstances of the case, under proper instructions from the court. *Norfolk & W. R. Co. v. Gee*, 806.

7. *Grade Crossing—Duty of Traveller—Look and Listen—Case at Bar.*—It is the duty of one about to cross a railroad at grade to look and listen for approaching trains before going on the track, and to do so when and where his listening will be reasonably effective. The track itself is a proclamation of danger. In the case at bar, the evidence discloses such contributory negligence on the part of the plaintiff's intestate, who was killed by a collision with a train at a grade crossing, as bars the plaintiff's right of recovery. *Stokes v. Southern R. Co.*, 817.
8. *Joint Use of Grade Crossing—Contributory Negligence.*—Where the view of a grade crossing of a railroad and a furnace track is obstructed, the engineer of the furnace company who backs his locomotive onto the track of the railroad, with his back to the railroad, so that he can not see, at a time when he knows that a passenger train on the railroad is due and must pass over that point, cannot recover of the railroad company for injuries resulting from a collision with such passenger train, even if the servants in charge of such train were guilty of negligence in giving warning of its approach. His own contributory negligence bars recovery. *Risque v. Ches. & O. R. Co.*, 476.
9. *Public Crossing—Look and Listen—Contributory Negligence.*—It is the duty of one about to cross a railroad track at a public crossing to listen and look in both directions from which a train may approach. If he fails to do so and attempts to cross in front of a rapidly moving train and is injured there can, ordinarily, be no recovery. Trainmen have the right to assume that a traveller will take these necessary precautions, and until it is, or in the exercise of ordinary care ought to be, discovered that he is in a place of danger, and is not conscious of his peril, it is not negligence to fail to stop the train. *Brammer v. Norfolk & W. R. Co.*, 50.
10. *Public Crossing—Failure to Keep in Order—Resulting Damage—How Charged in Pleadings.*—A count in a declaration against a railway company which charges that the defendant failed to keep its right of way, at a public crossing where the alleged injury is charged to have been inflicted, "sufficiently

smooth and level to admit of safe and speedy travel over such crossing" as required by the statute, but on the contrary, through its negligence, the public road at the crossing, and within defendant's right of way, was rough, gullied and obstructed, and that, the plaintiff's horse becoming frightened she was unable to control it as she could otherwise have done, and that the buggy in which she was riding was drawn by her horse with great violence against the crossing sign post of the defendant, the buggy broken, the plaintiff thrown out, and the injuries complained of inflicted, is bad on demurrer, because it fails to show the nature of the gullies and obstructions which it avers were in the highway, or how they prevented the plaintiff from controlling her horse, or such state of facts as show that the condition of the highway was the proximate cause of her injuries. *Norfolk & W. R. Co. v. Gee*, 806.

11. *Public Crossing—Personal Injury—Failure to Give Crossing Signal—Contributory Negligence—Case at Bar.*—One who takes no precautions for his own safety, but, without looking or listening for approaching trains, sits far back in a covered wagon and drives his team upon a railroad at a public crossing and is injured by a collision with a passing engine, is not entitled to recover damages of the railroad company for such injury,* even though the engineer failed to sound the crossing signal. His own contributory negligence is the proximate cause of his injury, and this bars his recovery, unless after his danger was discovered, or by the exercise of ordinary care by those in charge of the engine might have been discovered, they failed to exercise ordinary care to avoid the collision. *Brammer v. Norfolk & W. R. Co.*, 50.
12. *Negligence—Case at Bar—Collision with Work-train Out of Limits.*—In an action by a locomotive engineer against the railroad company whose servant he is, to recover damages for an injury resulting from a collision with a work train standing on the track, if it be conceded that the conductor of the work train could have his train standing beyond the limits prescribed by his orders, still it is for the jury to say, upon the evidence, whether it was negligence to be beyond those limits on the occasion of the accident, and whether or not such negligence if any, contributed to the accident. *Norfolk & W. R. Co. v. Spencer*, 637.
13. *Negligence—Contributory Negligence—Case at Bar.*—Although the engineer of a freight train which collides with a work train standing on the track may have been guilty of negli-

gence which contributed to the accident, yet, if the engineer of the work train could, in the result, by the exercise of ordinary care and diligence, have avoided the accident which happened, then the negligence of the engineer of the freight train will not excuse the railroad company, whose servants they both are, and he may recover for the injuries inflicted on him by such collision. In the case at bar, the evidence was sufficient to warrant an instruction to this effect. *Norfolk & W. R. Co. v. Spencer*, 657.

14. *Walkways on Bridge—Invited Guests—Licensees.*—The fact that a railroad company builds a bridge for its own use across a river, with a walkway on each side of the tracks, and that persons so using the bridge, after landing, walk along the right-of-way of the railroad company in going to their homes or places of business, and have so used it for many years, with the knowledge of the company, does not constitute such persons the "invited guests" of the company while on said right of way, but mere licensees. This is especially true where danger signals have been conspicuously erected warning persons to keep off the tracks. *Williamson v. Southern R. Co.*, 146.

See CARRIERS; CONTRACTS, 7; EMINENT DOMAIN, 2; EVIDENCE, 2, 11, 14; INJUNCTIONS, 2; MASTER AND SERVANT, 3, 9, 10, 13; MORTGAGES; NEGLIGENCE, 2, 11; PLEADING, 5; QUO WARRANTO.

RECEIVERS.

1. *Debts Created By—Liability of the Fund.*—Generally the appointment of a receiver does not affect vested rights or interests of third persons in property which is the subject of the receivership, or disarrange the order of priority of existing liens, but where the receiver is appointed at the instance and for the benefit of lien creditors, and is charged with the duty of operating the property for their advantage, all proper charges, expenses, and liabilities incurred incident to the receivership are held to be a first charge not only upon the current earnings, but also on the *corpus* of the estate. *People's Nat'l Bank v. Va. Textile Co.*, 34.
2. *Obedience to Orders—Promptness.*—A receiver is the hand of the court, and it is his duty to yield prompt and unquestioned obedience to all its lawful decrees. The court cannot tolerate a practice which renders it as difficult to compel the disbursement of funds in the hands of its receiver as to enforce the collection of a controverted demand. *Lyle v. Sarvey*, 229.

3. *Receiver's Liabilities—Ascertainment—Order of Reference.*—In the absence of other proper evidence of the liabilities of the receiver chargeable on a fund under the control of the court, the cause should be referred to a commissioner to enquire into and take evidence touching the same; and, when allowed, the decree for their payment should specify the amount of each claim, and fix the date from which interest is to be computed. *Peoples' Nat'l Bank v. Va. Textile Co.*, 34.

See APPEAL AND ERROR, 2; CORPORATIONS, 7.

REDEMPTION. See VENDOR AND PURCHASER, 1.

REFERENCE. See EQUITY, 8, 12.

REFORMATION.

Fraud and Mistake—How Charged—General Relief.—Where fraud or mistake is relied upon as a ground of equitable relief, the particular manner in which the fraud was committed or the mistake made, and the end or design to be accomplished, must be set forth in the pleadings. Where the facts stated in a bill show what was the real agreement between the parties, and that a material part was, by mistake, omitted from the agreement when it was reduced to writing, the bill is sufficient to entitle the party injured to a reformation of the written instrument under the prayer for general relief. *Beach v. Bellwood*, 170.

See EVIDENCE, 19, 20.

REGISTRY. See CONTRACTS, 9.

RELEASE. See CORPORATIONS, 8.

REMAINDERS. See WILLS, 1.

RENTS. See GUARDIAN AND WARD, 2.

REPAIRS. See EASEMENTS, 2.

RES JUDICATA.

1. *Final Decree—Failure to Appeal—Case in Judgment.*—The record in this case disclosed the fact that in a prior suit, under proper pleadings, with all necessary parties before the court,

it had been finally determined by a competent court, with jurisdiction of the subject matter and the parties, that the appellant had only a life estate in the property which she now claims in fee. The decree so determining was final, and from it no appeal was taken, and to revive it no bill was filed, within the time prescribed by law. Her rights and interests were thereby irrevocably fixed and ascertained, and cannot now be changed by any court, original or appellate. *Stout v. Stout*, 480.

RESTRAINT OF TRADE. See CONTRACTS, 1, 5; PLEADING, 4.

ROADS.

1. *Road—What Constitutes—Statutory Road—Width—Discretion—Bridleway.*—The word "road" in its generic sense means all kinds of ways, but in its statutory sense in this State it signifies a turnpike, State road, or country road, suitable in width and grade for the convenient passage of vehicles. Formerly the standard width was thirty feet, and the present statute, leaving the width discretionary with the board of supervisors, has never been construed as warranting the establishment of a way of inferior dignity to a "road". There is an implied limitation that the character of the way as a "road" shall be maintained. In the absence of special statutory authority a bridleway "for horse back travel" cannot be established. *Terry v. McClung*, 599.
2. *Public Roads—Dedication—Use—Acceptance—License.*—The mere use of a road for any length of time will not make it a public road. A mere permission to the public, by the owner of land, to pass over a road upon it is, without more, to be regarded as a license revocable at the pleasure of the landowner. A road dedicated to the public must be accepted by proper authority upon its records before it can be a public road. *Terry v. McClung*, 599.

SALES.

1. *Articles to be Made—Case at Bar—Bailment.*—Under the contract in suit the seller agreed to make, deliver, and install machinery for a ship, for which the purchaser was to pay one-third cash upon delivery, one-third when the machinery was installed, and the residue when tested and received by the

engineer of the government for whom the completed whole was intended. The purchaser agreed, upon request, to afford the facilities of its yards for the installation, to insure for the benefit of the seller as his interests might appear, and to indemnify him against loss or damage occasioned by certain specified causes, without his fault. The purchaser also agreed to make the payments above specified. The machinery was made and delivered according to contract, and the cash payment was made. The property of the buyer was then placed in the hands of a receiver in insolvency proceedings.

Held:

This was a sale on time as to a part of the purchase price, and not a bailment, and, the machinery having been not only completed but actually delivered and paid for to the full extent demanded by the contract, title passed to the buyer. *Trigg Co. v. Bucyrus Co.*, 79.

2. *Future Delivery—When Title Passes.*—When a contract is made for the purchase of an article hereafter to be delivered and paid for, as long as any act remains to be done by the vendor in order to put it in a state of readiness for delivery, the property does not pass to the buyer, but still remains at the risk of the seller. *Trigg Co. v. Bucyrus Co.*, 79.

See CONTRACTS, 3.

SEPARATE ESTATES. See MARRIED WOMEN, 2.

SETTLEMENT. See INSURANCE, 3.

SPECIAL LEGISLATION. See CONSTITUTIONAL LAW, 3, 8.

SPECIFIC PERFORMANCE.

1. *Case in Judgment—Fraud.*—The evidence in this cause shows that the tract of land claimed by the appellant in his bill had been in the possession of the husband and father of the appellees for some time prior to his death; that he claimed it as his own in the presence of appellant, without dissent on his part; that he put valuable improvements thereon; that he caused it be surveyed in the presence of appellant, with a view of taking a deed from him, and that appellant pointed it out as the land he was to convey him. If the evidence does not establish the fact that appellant gave or agreed to give to the husband and father of appellees, who was his

brother, a title bond for the land, it clearly shows that the latter was in the possession of the land for a number of years under a contract or agreement so far executed that it would be a fraud upon his rights to now refuse an enforcement thereof. *Neece v. Neece*, 343.

2. *Doubtful Title—Title by Adverse Possession.*—A purchaser will not be compelled, in equity, to accept a doubtful title, but he may be compelled to accept one resting upon a hostile, adverse, and uninterrupted possession under color of title which has continued a sufficient length of time to bar the rights of any possible claimant. *Dunn v. Stowers*, 290.
3. *Tender of Deed.*—When the vendee of land calls upon the vendor by bill for that purpose, to exhibit his title so that the purchaser may accept it if found to be good, or have the contract rescinded if bad, it is not necessary that the vendor shall be able to make a complete deed at the time he files his answer. It is sufficient if, with the aid of the court, he can tender a marketable title at the hearing. *Dunn v. Stowers*, 290.
4. *Terms of Contract—Security for Deferred Payments.*—A vendee of land who is required to specifically perform his contract of purchase should also be permitted to execute a deed of trust to secure the payment of the purchase money bonds not yet due where the contract of purchase provides for such security for deferred instalments of purchase money. *Pence v. Life*, 518.

See EQUITY, 14; VENDOR AND PURCHASER, 3.

STATE CORPORATION COMMISSION.

Action Presumed to be Right.—The action of the State Corporation Commission in imposing a fee or tax on a foreign corporation seeking to do business in this State is to be regarded as *prima facie* correct, as in other cases. Constitution, Sec. 156, cl. (f). *Standard Oil Co. v. Commonwealth*, 683.

See TAXATION, 5, 8.

STATUTES.

1. *Construction.*—In construing a statute it must be viewed as a whole, so as to make all of its parts harmonize, if practicable,

and give a sensible and intelligent effect to each. It is not to be presumed that the Legislature intended any part of a statute to be without meaning. *Hoover v. Saunders*, 783.

2. *Construction—Re-enactment.*—Where the language of a constitutional provision and of a statute has been construed by this court and since that time there has been a general revision of the laws and a new constitution has been adopted, each of which retains the language construed, such construction will be taken to have been approved. *Elliot v. Ashby*, 716.
3. *Code of 1887—Discrepancies—Construction.*—The Code (1887), is one act, and is to be construed as a whole, and apparent discrepancies and disagreements are to be so interpreted as that all, if possible, may stand together. *South & W. R. Co. v. Com'th.*, 314.
4. *Repeal—Effect on Pending Causes.*—Upon the repeal of a statute conferring upon a court jurisdiction of certain causes, without any saving clause as to pending causes of that class, such causes lapse. *Terry v. McClung*, 599.
5. *Special Followed by General—Construction—Repeals.*—Where there are two statutes, the earlier special and the latter general, but containing terms broad enough to cover the subject matter of the special, the presumption is that the special is to be considered as remaining an exception to the general, and the general will not repeal the special unless its provisions are manifestly inconsistent with those of the special. This is particularly so where the general and special provisions are parts of the same act or code of laws. *South & W. R. Co. v. Com'th.*, 314.

SUBROGATION.

Act of Limitations—Consent Decree—Cross Bill—Case in Judgment.—For value received, land was conveyed to a trustee for the sole and separate use of a married woman, for and during the term of her natural life, with power to her to appoint the fee by will, which power she exercised in favor of her son and daughter in equal shares. The grantor reserved a lien in the deed for \$3,000. Pending the life estate the woman borrowed \$4,000 to pay off the aforesaid lien and accumulated interest which was so applied. The woman and her husband executed their bond for the amount and united with her trustee, and the beneficiaries of the reserved lien,

in a deed reciting the payment of the lien and conveying the land in fee to secure the \$4,000 loan. The title of the daughter to one-half the fee in remainder devolved upon her father the husband of the married woman. In a suit to settle up the father's estate and to pay his debts it is charged in the bill that the son is the owner of one-half of this tract of land, which is liable for half of the \$4,000 debt, and the father was the owner of the other half which was liable for the other half. The son was a party to this suit and consented to a decree charging his land with one-half of the debt two days before the time at which it is alleged the debt became barred by act of limitation. The creditor secured in the \$4,000 debt was also a party to the suit, and, after the entry of said consent decree, filed a cross-bill against the son and others, setting out the lien reserved, the loan of the \$4,000 to pay it off, and its application thereto, the bond and deed above mentioned, and other proceedings in the suit, and asking to be subrogated to the rights of the creditor in the lien secured first above mentioned.

Held:

- (1) The land devised to the son is liable for one-half the \$4,000 debt.
- (2) The debt is not barred by the statute of limitations.
- (3) It was a proper case for a cross-bill and the demurrer thereto was properly overruled. *Moon v. Highland Dev. Co.*, 551.

SUICIDE. See **INSURANCE**, 28.

SUPPORT. See **CONTRIBUTION**.

TAXATION.

1. *Choses in Action—Non-Resident Trustee—Resident Beneficiary.*—Intangible personal property in the hands of a non-resident trustee, in the income from which a person over the age of 21 years residing in this State has a life estate, is, by virtue of the statute in such case made and provided (Acts, 1897-8, p. 519, amending Code, section 492), taxable in this State in the county or corporation in which the beneficiary resides. The tax, though assessed in the name of the trustee, is not against him, but the beneficiary. He is the mere conduit through the medium of which the tax upon the property of a citizen passes into the treasury. *Selden v. Brooke*, 832.

2. *Constitutional Law—Uniform Taxation—Towns—Exemption from County Levies.*—The Legislature has no power to exempt the taxable persons and property in a town situated within the limits of a county and forming a part thereof, from county levies, as sec. 168 of the Constitution expressly provides that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and this uniformity extends not only to the rate and mode of assessment, but also to the territory to be assessed. *Campbell v. Bryant*, 509.
3. *Distiller's License—Amount of Tax—Computation of Time.*—The statute fixing a license tax on distillers at five dollars for any period under three months, at twenty dollars for more than three but less than six months, and at fifty dollars for six months or more, must if possible be so construed as to be in harmony with section 555 of the Code, providing that all licenses, with a few exceptions, shall terminate on the 30th day of April, so that both statutes may stand, if possible. The two may be reconciled and effect given to both by only allowing the qualified or limited license to be issued within the limited period from the termination of the fiscal year, and this seems to be the reasonable and rational construction of the statutes in question. *Shifflet v. Grimsley*, 424.
4. *Equity—Jurisdiction—Unauthorized Tax.*—Equity has jurisdiction to enjoin the collection of an unauthorized tax and to declare unconstitutional the law under which the tax is imposed. *Campbell v. Bryant*, 509.
5. *Foreign Corporations—Public Service Corporations—Fees to State—Revenue Laws—Construction.*—The fee prescribed by statute to be paid by every foreign corporation authorized by its charter to exercise the powers of a transportation or transmission company as a prerequisite to its right "to do business in this State" must be exacted of every such corporation before it can do *any* business in this State, whether that of a public service corporation or not. If the character of the foreign corporation confers upon it the right to exercise the powers of a transportation or transmission company it is within the language of the statute and must pay the fee, although it has never exercised such power in any State, and does not ask to exercise it in this State, and the Legislature of this State is forbidden by the Constitution to confer such power. The test of liability for the fee is not whether the corporation can or intends to carry on the business of a pub-

lic service corporation, but whether its charter authorizes it to carry on that business. If so authorized, then it belongs to the class upon which the Legislature has laid the burden, and the fee must be paid. *Keith, P., and Cardwell, J., dissenting. Standard Oil Co. v. Commonwealth*, 683.

6. *Property of Lunatic—Situs—Erroneous Assessment—Time for Correction.*—Section 571 of the Code providing for the correction of an erroneous assessment of personal property within two years has no application to the improper assessment of the estate of a lunatic at the place of his domicile instead of the domicile of his committee, and such impropriety or error may be corrected when the tax is sought to be enforced although the two years provided for by Sec. 571 have expired. *Hurt v. Bristol*, 213.
7. *Situs of Property of a Lunatic.*—The choses in action of a lunatic in the hands of his committee and about which there is no litigation, are taxable at the place of residence of the committee and not that of the lunatic. Sections 2700 and 492b of the Code of 1904 only apply to such fiduciaries as represent the court, and provide the means by which the court holds and controls the fund in its charge. *Hurt v. Bristol*, 213.
8. *Validity of Tax—Construction—As Between State and Foreign Corporations.*—The rule that doubts as to the validity of a tax are to be resolved in favor of the citizen has no application to the case of a foreign corporation asking for the privilege of doing business in this State. *Standard Oil Co. v. Commonwealth*, 683.

See BANKS AND BANKING, 1, 2, 3, 4; CONSTITUTIONAL LAW, 7; PARTIES, 1.

TELEGRAPH AND TELEPHONE COMPANIES.

Interstate Commerce—Domestic Messages—Police Power.—The doctrine announced in *Western Union Tel. Co. v. Reynolds*, 100 Va. 459, that where the initial and terminal points of a telegram are both in this State, and it is transmitted over the wires of the same company, and concerns only citizens of this State, the message is a domestic one, and its character as such is not affected by the circumstance that the line passes in part over the territory of another State, or that the company has established a relay office in such other State, at which the message is lost, is reaffirmed. There is involved the

exercise of an important police power of the State which ought not to be surrendered unless declared unconstitutional by the Supreme Court of the United States. *Keith P.*, and *Cardwell, J.*, dissenting. *West. Union Tel. Co. v. Hughes*, 240.

TENANTS IN COMMON.

Interest—Guardian de facto—Code, Sec. 3294.—At common law a tenant in common could not have an accounting from the occupying tenant, in the absence of an express contract, even though excluded from the common property. This was changed at an early day by what is now Sec. 3294 of the Code, but this section was not meant to deprive an infant tenant in common from recovering compound interest from a guardian *de facto* who was his co-tenant. *Watts v. Watts*, 269.

See GUARDIAN AND WARD, 2, 3.

TRESPASSERS.

Duty of Foresight.—The duty which one owes to a trespasser is to use ordinary care not to injure him after his peril is discovered. *Seaboard R. Co. v. Vaughan*, 113.

TRUSTS AND TRUSTEES.

1. *Vendor and Purchaser—Sale by Trustee—Suit to Set Aside—Case in Judgment.*—Upon the evidence in this cause it is held that the sale made by trustees, which was set aside by the trial court, is a valid sale. The trustees had authority to sell, the property was duly advertised, there was no collusion between the trustees and the purchaser, the price obtained was not so inadequate as to justify the court in setting it aside on that ground and the grantor in the deed of trust practically ratified the sale after it was made by assigning the surplus purchase money to a third person. *Lawler v. French*, 140.
2. *Conveyance for Benefit of Wife and Children—Case in Judgment—Construction.*—Upon a conveyance of property to a trustee to hold during the natural life of a married woman "for the joint use, benefit, profit and advantage of herself and her present and future children by" her present husband, with power to the wife to appoint the remainder in fee by her will, and with power to the trustee, during her lifetime, to

change the investment upon the consent, in writing, of the wife—the changed investment to be held upon the same trusts—the children are entitled to a joint interest with their mother in the rents and profits of the trust subject during the continuance of the life estate. *Wright v. Wright*, 8.

3. *Duty of Trustees—Good Faith—Prudence—Case in Judgment.*—

No liability attaches to a trustee who acts in good faith, within the scope of his powers and with the care of an ordinarily prudent man. In the case in judgment the whole matter of finding a purchaser and making a sale of a farm in which, or in the proceeds of the sale of which, appellant had an interest, was left exclusively in the hands of N., who had bought and paid the purchase price for the farm, and held the legal title thereto. The gravamen of the complaint against him is that the farm was sold for an inadequate price, and that this constituted a breach of trust, and was in fraud of appellant's rights. Upon an examination of the evidence, it is held that while N. did occupy a relation of trust to the complainant, he acted within the scope of his powers in making the sale, that the price obtained was fair and reasonable, that there was no direct proof of fraud on his part, and that appellant suffered no injury by such sale, and hence cannot recover. *Winder v. Nock*, 759.

See APPEAL AND ERROR, 6; EQUITY, 3; PARTNERSHIP, 3; TAXATION, 1.

UNDUE INFLUENCE. See FRAUD, &c.

UNFAIR COMPETITION. See PARTNERSHIP, 4.

VALUE. See INSURANCE, 22.

VENDOR AND PURCHASER.

1. *Right to Redeem—Terms of Redemption—Case in Judgment.*—

Under the terms of the agreement in suit allowing the former owner of land to redeem upon reimbursing the purchaser for principal, interest and costs expended by him in buying the land at a judicial sale thereof, it is not error to require such former owner, as a condition precedent to his right to redeem, to pay not only the amount expended as aforesaid, but also the balance owing by the former owner to such purchaser on a deed of trust given on a part of the land to secure a loan made by the purchaser to such owner. *Cupp v. Lester*, 350.

2. *Sale by the Acre—Case in Judgment.*—Where a vendor's agent in negotiating the sale of a tract of land, in response to an enquiry of the vendee, represents the tract to contain 179 acres, and offers to have it surveyed if desired, and the deed from the vendor describes the tract as containing 179 acres more or less, this is a sale by the acre, and not in gross. For the principles governing the subject of such sales, see the opinion of the court. *Berry v. Fishburne*, 459.
3. *Warranty by Vendor's Heirs—Waiver.*—A purchaser of land cannot refuse to accept the deed and warranty of the vendor's heir, where, after the death of the vendor, he recognizes the contract as still binding on him, retains possession and makes payments, and there has, in the meantime, been great depreciation in the value of the land, and he has made no objection to the title until sued for the purchase-money. *Dunn v. Stowers*, 290.

See JUDICIAL SALES, 1; TRUSTS AND TRUSTEES, 1.

VENUE. See CRIMINAL LAW, 19.

VERDICTS.

1. *Conflicting Evidence—Weight of Evidence—Negligence.*—Where the evidence is conflicting as to the negligence of the defendant, or the contributory negligence of the plaintiff, the verdict of the jury will not be disturbed unless palpably erroneous. Nor will this court undertake to pass on the weight of evidence, or the credibility of witnesses. This is the province of the jury which the court will not usurp. *Norfolk & W. R. Co. v. Spencer*, 657.
2. *Excessive—Case at Bar.*—The verdict of a jury in an action for personal injuries will not be set aside as excessive or unreasonable when there is no pretense that the jury were actuated by partiality or prejudice. In the case at bar the verdict was well warranted by the evidence. *Lane Bros. Co. v. Bott*, 615.
3. *Interest.*—This court will not disturb the verdict of a jury allowing interest from November 1, on an admitted loss of freight by a railway company occurring October 18, preceding. *Ches. & O. R. Co. v. Stock*, 97.

See APPEAL AND ERROR, 5, 12; INSTRUCTIONS, 6; JUDGMENTS, 2.

WAIVER. See CONTRACTS, 2; INSURANCE, 2, 16.

WARRANTIES. See INSURANCE, 13, 23.

WATERS AND WATERCOURSES.

1. *Eminent Domain—Flooding Land—Report of Commissioners—Conclusive Effect.*—The report of commissioners, duly appointed under the provisions of section 1349 of the Code, 1904, that if leave is granted to erect a mill-dam at a given place "the health of the neighborhood will be annoyed by the stagnation of water caused by said pond producing malaria, chills and fever," is under the provisions of section 1353 of the Code of Va., 1904, conclusive against the applicant to erect the dam, and no evidence will be heard against it. *Bishop v. Bagley*, 29.
2. *Eminent Domain—Report of Commissioners—Failure to Sign—Adoption.*—Where commissioners appointed to enquire and report upon the propriety and expediency of flooding land by mill-dam meet upon the land and agree upon a report which they authorize one of their number to write out and sign for them, and such report is so written out and signed, and afterward acknowledged and adopted by all the commissioners in open court, this is a reasonable and sufficient compliance with the law. *Bishop v. Bagley*, 29.
3. *Eminent Domain—Power Furnished by a Stream—Rights of Riparian Owners.*—Riparian owners have a right to a stream flowing through their lands in its natural condition, and may protect that right not only for present needs but for possible future ones; and, although no one of the riparian proprietors owns the banks on both sides of the stream, nor has the right to erect a dam across it, and no two or more of them, as co-tenants, own said banks or have the right to erect a dam across it, yet each owns an interest in the power furnished by the stream, although not actually applied, which may be united in one ownership, or be held as co-tenants, and this interest cannot be taken for public use without making just compensation to the owner thereof. *Rankin v. Harrisonburg*, 524.
4. *Eminent Domain—Raising Dam—Riparian Owners—Compensation.*—Where the effect of raising a dam in a river is to flood its banks, impose upon its bed a greater volume of water, destroy fords, render adjacent lands more liable to overflow,

and greatly to alter the natural flow and condition of the stream, adjacent riparian proprietors affected thereby are entitled to compensation from the person asking to have the dam raised. *Rankin v. Harrisonburg*, 524.

See CONTRACTS, 8.

WILLS.

1. *Case in Judgment—Ultimate Fee Simple—Liability for Debts.*—

A testator in the first clause of his will devised his estate to his wife for life, for the use of herself and certain of their children. The second clause of his will is as follows: "Secondly. After the death of my wife, I direct that my entire estate, both real and personal, without sale or appraisement, pass into the hands of the above-named children, or such of them as remain on my property for the period of twenty-five years, unless they elect to divide sooner; then, after the expiration of twenty-five years, or at the time my children elect to divide, should they so elect, then I direct that my entire estate, both real and personal, be equally divided between all of my children." After the death of the wife, creditors of some of the children sought to subject their interests in the property to the payment of their debts.

Held:

The will invested the children with the ultimate fee-simple in remainder after the death of their mother, and the same is liable, as an incident of such estate, for the payment of their debts. If it was the intention of the testator to place the property beyond the reach of the creditors of the devisees, such intention cannot be carried into effect. *Scott v. Patterson*, 455.

2. *Election—Devise of Wife's Land—Election of Widow—How Made.*

Where a testator disposes of property belonging to his wife in her own right, and also makes provision for her by his will, she has the same right of election as to such property as any other person has, and whether or not she has elected to take under or against the will is to be determined as in other cases. Such election need not be express, but may be implied by conduct, acts, omissions and mode of dealing with the property. In the case in judgment the widow clearly elected to claim her own land by selling and conveying it by deed with covenants of general warranty a few days after the death of her husband. It is immaterial

whether the purchaser was a devisee or legatee under her husband's will, or was a stranger to it. *Pence v. Life*, 518.

3. *Election by Widow—Dower—Devise of Wife's Land—Code, Sec. 2271.*—The provisions of sec. 2271 of Code have no application to a case where a testator disposes of property belonging to his wife in her own right and also makes provision for her out of his estate by his will, but were intended to provide how a widow must proceed who desires to reject the provision made for her by her husband's will out of property other than her own, and to take such interest in his lands as the law gives her. *Pence v. Life*, 518.
4. *Issue Devisavit vel non—Terms of Issue—Code, Sec. 2544.*—It was not intended by Code, Sec. 2544, to make hard and fast the exact terms in which an issue *devisavit vel non* should be framed. Where a will is assailed on the ground of incapacity of the testator to make a will and of fraud and undue influence exerted over him and the issue tendered by the bill is accepted by the answer, and the will is assaulted and defended as a whole, and there is no suggestion from any source that the will may be valid in part and invalid as to other parts, in framing an issue under Code, Sec. 2544, it is sufficient to direct the jury to ascertain whether a given paper, purporting to be the last will and testament of the testator, is the true last will and testament of the testator. It is not necessary to go further and enquire whether any part of said paper is his will. *Rowland v. Rowland*, 673.

WRECKS. See CONSTITUTIONAL LAW, 4, 5.

